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No. 96-8653

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

KEVIN D. GRAY,
Petitioner,

v.

MARYLAND,
Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

JOINT APPENDIX

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EDITOR'S NOTE

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DOCKET ENTRIES

DATE	PROCEEDINGS
February 16, 1994	Indictment filed charging defendant with murder in the first degree
March 10, 1994	Omnibus Pre-Trial Defense Motion filed
June 17, 1994	Defendant's Motion for Severance Heard and Denied
June 20-24, 1994	Jury Trial
June 24, 1994	Verdict: Count 1: (Murder) Not Guilty; (Involuntary Manslaughter) Guilty
August 1, 1994	Disposition
August 1, 1994	Notice of Appeal filed
December 4, 1995	Opinion of Court of Special Appeals of Maryland filed reversing judgment of conviction and remanding case for new trial
April 17, 1996	Writ of Certiorari issued by Court of Appeals of Maryland
January 15, 1997	Opinion of Court of Appeals of Maryland filed reversing the judgment of the Court of Special Appeals of Maryland and affirming the judgment of conviction of the Circuit Court for Baltimore City

IN THE CIRCUIT COURT
FOR BALTIMORE CITY, MARYLAND

Indictment No. 194047002

STATE OF MARYLAND

versus

KEVIN D. GRAY

June 17, 1994

EXCERPT FROM OFFICIAL TRANSCRIPT OF PROCEEDINGS

(HEARING ON PETITIONER'S MOTION TO SEVER DEFENDANTS)

BEFORE:

THE HONORABLE ANDRE M. DAVIS, JUDGE

* * * *

[3] PROCEEDINGS

MS. STARKS-SAXON: This is State of Maryland versus Anthony Bell, 194045004 and Kevin Gray 194047002.

MR. AMARAL: Good afternoon, Your Honor. For the record, Gill Amaral on behalf of Mr. Bell.

MS. GLANCY: Good afternoon, Your Honor. For the record, Maureen Glancy, on behalf of Mr. Kevin Gray.

MS. STARKS-SAXON: Your Honor, the detective was supposed to meet me at two-fifteen in the victim witness room. I expect him to be here any moment. I don't know why he's so late.

MR. AMARAL: He's been here. Detective Pennington has been here for fifteen or twenty minutes. He just stepped out to use the men's room.

MS. STARKS-SAXON: Maybe he misunderstood because I thought we were going to meet in victim witness.

MS. GLANCY: Your Honor, I just wanted to clarify something for the record. When you asked what motions there were, I was speaking as to what motions there would be testimony on. [4] Depending on the Ruling on this motion, there may be a severance motion pressed and there may be a motion in limine.

THE COURT: I understand.

MS. STARKS-SAXON: Your Honor, I just want to say that Mr. Gray just gave an oral statement. Mr. Bell gave a formal written statement, but any portion involving his co-defendant, we would redact.

THE COURT: I understand, of course. I have reviewed the copy of what purports to be Mr. Bell's statement that was filed together with the State's discovery. I notice that in that statement he seemed to name by nickname perhaps one or two, or perhaps as many as three other people, and so that's what you're referring to Ms. Saxon. If the statement of Mr. Bell is admitted—

MS. STARKS-SAXON: Uh-huh.

THE COURT: —then in a joint trial, the State would agree to redact all portions of the statement where Mr. Bell purports to identify others who were engaged in this activity with him.

MS. STARKS-SAXON: Yes.

MS. GLANCY: Your Honor, my position on [5] that, though, is that that is insufficient because the statement clearly goes to the fact that this was a group activity and the jury could very well infer that the names redacted refer to my client.

THE COURT: That's going to be true in every group situation, Ms. Glancy. I understand what you're saying and I understand your position. You haven't fully articulated it yet, and you'll have an opportunity to do that, but in any redacted statement situation of a joint trial there will be the possibility that the jury could infer that what's missing is the name of the co-defendant. So I'll give you a chance to address that—

MS. GLANCY: Thank you.

THE COURT: —after we've heard the evidence and the argument on the statement itself.

* * * *

[45] MS. GLANCY: Yes, Your Honor. We have filed formally with our omnibus motions a request for severance in this matter. I believe it is [46] imperative on the Court to sever these two cases. Mr. Bell's statement, in its totality and in various parts, clearly is indicating a group activity in the beating death of Mr. Stacey Williams.

Therefore, it can only be inferred when these two gentlemen are sitting at the same defense trial table, that when he was implicating—when he, being Mr. Bell, was implicating himself, that he was, he must have implicated Mr. Gray.

Because we have no right to cross examine Mr. Bell as to his statement, Your Honor, I believe that the entire statement must be excluded, or in the alternative a severance must be granted. I think *Bruton* makes it clear that the reason for the red line type rule announced in *Bruton* was because of the fact that my client would be denied his right to confrontation, and it would be a logical inference drawn by a jury that if one client made a statement concerning a group activity and two people are on trial for that group activity, by implication the statement goes to the detriment of Mr. Gray, and he will not be allowed to cross examine on that.

[47] THE COURT: Thank you, Ms. Glancy. Ms. Saxon on that, let me engage you for a moment. Can

you tell the Court what you expect your evidence to show, apart from Mr. Bell's statement?

MS. STARKS-SAXON: I expect my evidence to show that these two gentlemen were observed beating the victim.

THE COURT: How many people—well, first of all, do you have eyewitnesses to the beating?

MS. STARKS-SAXON: I have one eyewitness to the beating.

THE COURT: One eyewitness to the beating?

MS. STARKS-SAXON: Yea.

THE COURT: How many people will that eyewitness testify participated in the beating?

MS. STARKS-SAXON: It was several people, but it included both of these two.

THE COURT: When you say several people, was it three or was it six? Was it five? Was it four, as best—

MS. STARKS-SAXON: It was six, Your Honor.

[48] THE COURT: So the witness is going to say specifically there were six men. Will the witness say they were all men—

MS. STARKS-SAXON: Uh-huh.

THE COURT: —beating another man?

MS. STARKS-SAXON: Yea.

THE COURT: Will the witness know the defendant, either of the defendants?

MS. STARKS-SAXON: Yes.

THE COURT: From prior acquaintance?

MS. STARKS-SAXON: Yea, he knew them enough to make the identification. He gave the officers the names and he did the photo I.D. He knew them from the community.

THE COURT: I assume this is not a participant?

MS. STARKS-SAXON: No.

THE COURT: So this is a non-participant eyewitness with prior knowledge of, an acquaintance of, both defendants who will testify that he observed the beating, that there were six men beating a seventh man, the

decedent, and that Mr. Gray and Mr. Bell were among the six doing the beating.

MS. STARKS-SAXON: Yes.

[49] THE COURT: And will this witness be one of the photo array witnesses or is this someone—

MS. STARKS-SAXON: One of the photo array witnesses.

THE COURT: Let me see if I can make sure I understand. Will the witness testify—will the evidence show that the witness identified Mr. Gray and Mr. Bell and then was shown a photo array, which included a photograph of Mr. Gray and Mr. Bell respectively?

MS. STARKS-SAXON: Yes.

THE COURT: And confirmed the earlier identification?

MS. STARKS-SAXON: Yes.

THE COURT: So the photo array, in that regard, really wasn't necessary, if you know what I mean?

MS. STARKS-SAXON: Well, it may not be necessary for purposes of the trial. It is necessary in terms of, you know—

THE COURT: That's what I mean.

MS. STARKS-SAXON: —the focus of the investigation.

THE COURT: All right. Apart from the eyewitness, what other evidence will the State [50] present as to the circumstances surrounding the death, just the one eyewitness?

MS. STARKS-SAXON: Well, we have another eyewitness, another witness who saw Kevin—

THE COURT: Mr. Bell.

MS. STARKS-SAXON: —in a group of guys chasing the victim.

THE COURT: You will not have any testimony with respect to Mr. Gray?

MS. STARKS-SAXON: Well, the witness will say there were other boys in the group, but she didn't know them.

THE COURT: She didn't know them. Did she know Mr. Bell or did she simply identify Mr. Bell from a photo array after the incident?

MS. STARKS-SAXON: She did not identify Mr. Bell. She identified Mr. Gray and Tank, the guy who was deceased.

THE COURT: I'm sorry, let's back up. So the second witness will identify Mr. Gray and Mr. Vanlandingham as among the five or six who were chasing Mr. Williams?

MS. STARKS-SAXON: Yes, just let me—I would have to inquire of her in a little more detail as to who was in the group, but she said [51] there was a group running after Stacey.

[51] THE COURT: All right. She did recognize Tank and Mr. Gray, and do you infer from that, that she knew them, again, from the neighborhood or from some earlier familiarity—

MS. STARKS-SAXON: Yes.

THE COURT: —with them?

MS. STARKS-SAXON: Yes.

THE COURT: Any other evidence, other than those two witnesses, eyewitness identifications?

MS. STARKS-SAXON: No, Your Honor, and then the autopsy.

THE COURT: All right. It seems to me in that light, that there is not a difficulty here with a statement which involves two people where we redact the name of the defendant who is making the motion, that there's going to be this compelling implication to the jury that the name that's been redacted or left out must be the name of the co-defendant.

To the contrary, I think that where you've got group activity and the evidence here is, apparently, going to be that there were at least five, and maybe as many as six men involved [52] in this assault on the victim, to redact this statement, it seems to me, will not unduly prejudice Mr. Gray.

It seems to me that this statement can be sanitized in about three different spots so as to remove the names of Tank and Mr. Gray and the jury will not be left with the unavoidable inference or implication that the person Mr. Bell is referring to in the statement is Mr. Gray.

I'll leave to the State over the weekend to take a magic marker or however you want to do it—

MS. STARKS-SAXON: Okay.

THE COURT: —in consultation with Ms. Glancy. It may make more sense to white out by taping over the names and then rephotocopying the statement, if you intend to introduce the statement as an exhibit, which I assume you do.

MS. STARKS-SAXON: Right.

THE COURT: But we'll talk about it next week, and however it can be done most cleanly and most thoroughly, then we'll do it, but, Ms. Glancy, I just don't see any prejudice befalling Mr. Gray if we can adequately sanitize this statement and take out any indication from Mr. [53] Bell contained in this statement of the identity of anybody else who was involved in the assault. Not just Mr. Gray's name, but we're going to take out all of the names because the evidence is going to be that there were six people involved, and, therefore, to take out all of the names, that will not hurt Mr. Gray, it seems to me.

MS. GLANCY: Well, Your Honor, the jury only has one other person to choose from because there are not five or six people on trial.

THE COURT: Oh, no. Well, I'll instruct the jury that the involvement or alleged involvement, or if the evidence seems to suggest that others are involved, obviously, they're not to consider that the others involved are not on trial. They should not speculate as to why others said to have been involved are not on trial. They are to consider only the evidence against each of the defendants in reaching their verdicts, and, of course, I would instruct the jury that they are not to consider Mr. Bell's statement as evidence against Mr. Gray, and I'll tell them that at the voir dire if you want me to, just to make sure that

they understand that Mr. Bell's statement is in no way evidence against Mr. Gray. But I think [54] that the redaction of the statement together with the instructions will avoid any prejudice to Mr. Gray.

MS. GLANCY: The whole proposition of *Bruton* is that such a limiting instruction will not work in this type of situation.

THE COURT: I understand, and I won't give it if you don't want me to give it, if you think it highlights it, either in voir dire or during regular instructions, but I am prepared to give it and I believe you're entitled to it, and I believe under the circumstances Mr. Gray should have the benefit of that instruction.

I made this ruling, of course. In addition to the fact that, according to the State's proffer, there will be eyewitness identification of both defendants as among the six who committed the deadly assault on Mr. Williams.

MS. GLANCY: Yes, but if the witnesses, if they do identify Mr. Bell and Mr. Gray as being among those six individuals, and then add to that a statement where Mr. Bell states that he was involved in the beating—

THE COURT: It makes the case against Mr. Bell simply stronger than Mr. Gray.

[55] MS. GLANCY: And it makes the case against Mr. Gray stronger.

THE COURT: I don't think so. I don't think so.

MS. GLANCY: Because two people are named, one of them admits, oh, yes, I was involved, that clearly makes the evidence of that one witness appear more believable, and that witness is stating that two people were recognized.

THE COURT: I understand your position. Your motion for severance is denied.

* * * *

IN THE CIRCUIT COURT
FOR BALTIMORE CITY, MARYLAND

(Title Omitted)

June 22, 1994

(LIMITING INSTRUCTION AND EXCERPT OF TESTIMONY OF DETECTIVE HOMER PENNINGTON)

* * * *

[20] THE COURT: Thank you, Mr. Amaral. Ladies and gentlemen of the jury, you're about to hear evidence concerning the statement provided by Mr. Bell when he was interviewed by the detective. You should understand, and I will remind you later, that this evidence concerning the statement provided by Mr. Bell is to be considered by you as evidence against Mr. Bell only and in no way is Mr. Bell's statement provided to the detective about which he's about to testify to be considered by you as evidence against Mr. Gray. It is evidence against Mr. Bell only, and as I will instruct you later, you will consider the evidence against each of the [21] defendants individually and reach a separate verdict as to each defendant. You may proceed, Ms. Saxon.

* * * *

[30] Q Okay. Would you read to the ladies and gentlement of the jury what the statement says?

A This is a statement of Anthony Bell taken on 1/14/94 at 0929 hours in the small interview room. The statement taken by Detective Pennington and Detective Ritz.

Question, is your name Anthony Bell?

Answer, yes.

Question, you're nineteen years old and your date of birth is 6/17/74?

Answer, yes.

Question, can you read and write?

Answer, yes.

Question, are you under the influence of alcohol or drugs?

Answer, no.

Question, you were explained your [31] explanation of rights. Do you fully understand them?

Answer, yes.

Question, are you willing to answer questions without an attorney present at this time?

Answer, yes.

Question, has anyone promised you anything if you answer questions?

Answer, no.

Question, what can you tell me about the beating of Stacey Williams that occurred on 10, November, 1993?

Answer, an argument broke out between deletion and Stacey in the 500 block of Louden Avenue. Stacey got smacked and then ran onto Wildwood Parkway. Me, deleted, and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up, we walked him back to Louden Avenue. I then walked over and used the phone, Stacey and the others walked down Louden.

Question, when Stacey was beaten on Wildwood Parkway, how was he beaten?

Answer, hit, kicked.

[32] Question, who hit and kicked Stacey?

Answer, I hit Stacey. He was kicked, but I don't know who kicked him.

Question, who was in the group that beat Stacey?

Answer, me, deleted, deleted, and a few other guys.

Question, do you know the other guy's name?

Answer, deleted, deleted, and me. I don't remember who was out there.

Question, did anyone pick Stacey up and drop him to the ground?

Answer, no, when I was there.

Question, what was the argument over between Stacey and deleted?

Answer, some money that Stacey owed deleted.

Question, how many guys were hitting on Stacey?

Answer, about six guys.

Question, do you have a black jacket with Park Heights written on the back?

Answer, yea.

Question, who else has these jackets?

[33] Answer, deletion.

Question, after reading this statement, would you sign it?

Answer, yes. He then signed it.

Q All right, now, officer, after he gave you that information, you subsequently were able to arrest Mr. Kevin Gray; is that correct?

A That's correct.

* * * *

IN THE CIRCUIT COURT
FOR BALTIMORE CITY, MARYLAND

(Title Omitted)

June 23, 1994

(TRIAL JUDGE'S INSTRUCTION TO THE JURY AND CLOSING ARGUMENT OF COUNSEL)

* * * *

[49] THE COURT: Ladies and gentlemen, now that you have heard all of the evidence and before you hear the argument of counsel, it is my duty to give you instructions on the law applicable to [50] this case. My instructions will be in two parts. Part one consists of general instructions designed to aid you in your consideration and evaluation of the evidence. Part two consists of specific instructions as to the criminal offenses charged which you will consider and as to which you will return your verdicts.

It is your duty as jurors to follow the law as I state it to you and to apply the law to the facts as you find them from the evidence you have received in this case. You are not to single out any one instruction as stating the law, but you must consider all of these instructions as a whole. You must not be concerned with the wisdom of any rule of law stated in these instructions, regardless of any opinion you may have as to what the law is or what the law ought to be.

My instructions on the law are binding upon you and it would be a violation of your duty to base a verdict in this case upon any view of the law other than that given by me in these instructions. It would also be a violation of your sworn duty to base a verdict in this case upon anything other than the evidence.

Now, as you well know, there are two [51] defendants in this case. They are charged with the same offenses. Felonious homicide, which includes the charges of murder and involuntary manslaughter, and with battery. I will define these charges and their various elements in a few moments.

For ease of reference and to make these instructions as clear as possible, I will from time to time in these instructions refer to the defendants in the singular as the defendant or a defendant, or from time to time I will refer to them in the plural as the defendants or any defendant. You will understand me to include within all such terms each defendant individually, unless I make it clear that I'm referring to only one of the defendants.

You must consider the evidence as it relates to each defendant separately and you must consider separately each offense charged against each defendant. A separate verdict must be returned for each charge against each defendant.

In this connection some of the evidence was admitted only against one of the defendants and not against the other defendant. You must consider such evidence only as it relates to the [52] defendant against whom it was admitted. Each defendant is entitled to have the case decided separately on the evidence that applies to that defendant.

You, the members of the jury, are the judges of the facts. In deciding the facts of this case, you must not be swayed by bias, prejudice, or by public opinion, because our system of law does not permit jurors to be governed by anything but the law and the evidence they receive. It is expected that you will carefully and impartially consider all of the evidence presented in this case, follow the law as stated in these instructions, and reach just verdicts regardless of the consequences.

My conduct during the trial in ruling on motions or objections by counsel, in my comments to counsel, in questions to witnesses, or any comments on the facts of the case while setting forth these instructions, must not

be taken by you as any indication of my opinion as to how you should decide any of the issues in this case.

You should not conclude from any words or conduct of mine that I believe or disbelieve the testimony of any witness or that I have any [53] opinion as to what the verdict in this case should be. You are the sole judges of the believability of any witness and of the facts. If I have said or done anything that seemed to indicate that I had formed an opinion about this case, not only are you not bound by that opinion, but you must disregard it. What the verdicts should be in this case is exclusively your duty and your responsibility.

Statements, objections, and arguments made by the lawyers are not evidence in this case. Do not be influenced by objections or requests to approach the bench, because lawyers have a duty to object to and obtain a ruling on the admission of evidence they believe should be excluded.

It is also their duty to point out to you those things they believe are most significant or most helpful to their side of the case. Remember, though, that when counsel call your attention to certain facts or suggest that you draw certain conclusions, what they say about the evidence is not binding on you. Your own recollection and interpretation of the evidence should control your deliberations.

[54] It is your duty to determine the facts and in so doing you must consider only the evidence I have admitted in this case. The term evidence includes the testimony of each witness and all physical and documentary exhibits admitted into evidence. Testimony and exhibits to which I have sustained an objection or which I have ordered stricken must not be considered by you because these things are not evidence.

While you should consider only the evidence in the case, you are permitted to draw reasonable inferences from the evidence that are justified in light of reason, experience, and common sense. There are two types of

evidence upon which you may base your decision in this case, direct evidence and circumstantial evidence.

Direct evidence is testimony of a witness who asserts actual knowledge of a particular fact, such as an eyewitness to an event. Circumstantial evidence is proof of a chain of facts which point to a particular conclusion based upon reason, experience, and common sense.

The law makes no distinction between the [55] weight to be given either direct or circumstantial evidence. No greater degree of certainty is required of circumstantial evidence than of direct evidence. In reaching your verdict in this case, you should weigh all of the evidence presented, whether direct or circumstantial evidence. You may not convict the defendant unless you find that the evidence when considered as a whole establishes guilt beyond a reasonable doubt as I explained that term in these instructions.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must believe all of the evidence to be true and accurate. An indispensable ingredient in your evaluation of the evidence is common sense and you are not obligated to accept as true anything merely because someone says it.

You alone are the judges of who and what should be believed. In making this decision you may apply your own common sense and everyday experiences. In determining whether a witness should be believed, you should carefully judge all of the testimony and evidence and the circumstances under which each witness has testified.

[56] You should consider the following factors: The witness' behavior on the stand and way of testifying, the witness' intelligence, whether the witness appeared to you to be telling the truth, whether and the extent to which the witness had an opportunity to see or hear the things about which testimony was given, the accuracy of the witness' memory, whether the witness had a motive not to tell the truth, whether the witness has an interest in the outcome of this case, whether the witness' testimony was

internally consistent, whether the witness' testimony was supported by or contradicted by other evidence, and whether and the extent to which the witness' testimony in court differed from the statements the witness made, if any, prior to trial. You need not believe any witness, even though the testimony of that witness is uncontradicted. In short, you may believe all, part, or none of the testimony or any witness.

A witness who has special training or experience in a given field is permitted to express opinions based on observed or assumed facts to aid you in deciding the issues in the case. In weighing the opinions of an expert, you [57] should consider the expert's experience, training, and skills and the expert's knowledge of the subject matter about which he or she is expressing an opinion.

You should give expert testimony the weight and the value you believe it should have. You are not required to accept any expert's opinion. You should consider an expert's opinion together with all of the other evidence.

The credibility of a witness may be discredited or impeached by contradictory evidence or by evidence that on some former occasion the witness made a statement or acted in a manner inconsistent with his or her testimony in this case on a matter material to the issues. Evidence of this kind may be considered by you in connection with all of the other facts and circumstances in evidence in deciding the weight to be given to the testimony of the witness.

In this, as in every criminal case, the defendant is presumed to be innocent of all crimes charged until he has been proven guilty beyond a reasonable doubt. The defendant comes into court clothed with this presumption and it remains with the defendant throughout the trial.

[58] The indictments filed against the defendants are not evidence of guilt. These documents are merely complaints which formally bring the defendant into court and which let the defendant know what the charges are. One of the original charges is no longer part of the case and must not concern you. You should not concern yourself

as to the reasons why that charge is not before you, and you should not concern yourself with the fact that others who may be implicated in the criminal offenses are not before you for trial.

The burden of proving the defendant guilty is upon the State and the defendant has no burden to sustain and does not have to prove his innocence. The State has the burden to prove every fact necessary to establish the elements of the offenses with which the defendant is charged. The State must establish the defendant's guilt beyond a reasonable doubt.

This burden does not require the State to prove guilt beyond all possible doubt or to a mathematical certainty, nor is the State required to negate every conceivable circumstance of innocence. A reasonable doubt is a doubt founded [59] upon reason. It is not a fanciful doubt, or a whimsical doubt, or a capricious doubt. If the evidence is of such a character as to persuade you of the truth of the charges against the defendant with the same force that would be sufficient to persuade you to act without reservation in an important matter in your own business or personal affiairs, then you may conclude that the State has met its burden of proof to prove the defendant's guilt beyond a reasonable doubt.

On the other hand, if you are not satisfied of the defendant's guilt to that extent, then reasonable doubt exists and the defendant must be found not guilty.

I will now instruct you as to the elements to be proved beyond a reasonable doubt by the State in order to establish the defendant's guilt of the offenses charged. The burden is on the State to prove beyond a reasonable doubt that the offenses were committed and that the defendant was the person who committed it.

You have heard evidence regarding the defendants as the persons who committed the offenses charged. In this connection, you should consider the witness' opportunity to observe the [60] criminal act and the persons committing it, including the length of time the witness had to

observe the persons committing the crime, the witness' state of mind, and any other circumstance surrounding the event.

You should also consider the witness' certainty or lack of certainty and the witness' credibility or lack of credibility, as well as any other factor surrounding the identification.

The identification of a defendant by a single eyewitness as a person who committed an offense, if believed beyond a reasonable doubt, can be enough evidence to convict a defendant.

Each of the defendants is charged with murder, which includes the lesser offense of involuntary manslaughter, and with battery. As to all of these charges, the defendant is charged with having committed these offenses personally or as what is called a principal in the first degree, and also as a principal in the second degree, or as an aider and abettor, that is, that he aided and abetted the commission of these offenses by another person or other persons who are not on trial.

A person who aids and abets in the [61] commission of a crime is as guilty as the actual perpetrator, even though he did not personally commit each of the acts that constitutes the crime. A person aids and abets the commission of a crime by intentionally, willfully, and knowingly associating with the criminal venture with the intent to help commit the crime, being present when the crime is committed, and seeking by some act of his own to make the crime succeed.

In order to prove that the defendant aided and abetted the commission of a crime, the State must prove that the defendant was present when the crime was committed and that the defendant wilfully and knowingly participated with the intent to make the crime succeed.

Presence means being at the scene or close enough to render assistance to the other perpetrators. Willful participation means voluntary and intentional participation in

the criminal act. Some definite and affirmative conduct by the defendant in furtherance of the crime is necessary.

The mere presence of the defendant at the time and place of the commission of the crime, without more, is not enough to prove that the [62] defendant committed or aided and abetted the commission of a crime. However, if presence is proven it is a fact that may be considered along with all of the surrounding circumstances in determining whether the defendant is guilty or not guilty.

Thus, if you find beyond a reasonable doubt that Mr. Williams died as a result of blows to his head, the State need not prove that the defendant personally inflicted the actual blows that directly caused the death of Mr. Williams if the State proves beyond a reasonable doubt that the defendant knowingly and wilfully aided and abetted the person or persons who inflicted those blows.

Evidence has been introduced that the defendant was not there when the crime was committed. You should consider this evidence along with all of the other evidence in this case. Thus, in order to convict the defendant, the State must prove beyond a reasonable doubt that the crime was committed and the defendant committed it, either as a principal in the first degree or as a principal in the second degree.

The defendants are charged with [63] felonious homicide, which includes murder and the lesser included offense of involuntary manslaughter. As to the charge of murder, the State asserts and the law recognizes three alternate theories that you may find, but are not required to find applicable in this case.

Murder is the killing of another person without legal justification or mitigation and, one, with either, A, the intent to kill, or, B, the intent to inflict such serious bodily harm that death would be the likely result or, two, while acting with an extreme disregard for human life. These three theories are the so-called intent to kill theory, the so-called grievous bodily harm theory, and the so-called depraved heart theory of murder.

As to the first two of these theories, specific intent is required, but the State need not prove premeditation or deliberation. In order to convict the defendant of murder under either of the first two theories, the State must prove, one, that the conduct of the defendant or of someone whom the defendant knowingly and wilfully aided and abetted caused the death of Mr. Williams, two, that the defendant or someone who the defendant [64] knowingly and wilfully aided and abetted engaged in the deadly conduct, either with the intent to kill or with the intent to inflict such serious bodily harm that death would be the likely result, three, that the killing was not justified, and, four, that there were no mitigating circumstances.

Intent is a state of mind and ordinarily cannot be proven directly because there is no way of looking into a person's mind. Therefore, a defendant's intent may be shown by surrounding circumstances. In determining the defendant's intent, you may consider the defendant's acts and statements and the acts and statements of any person who you determine beyond a reasonable doubt the defendant knowingly and wilfully aided and abetted, as well as the surrounding circumstances.

Further, you may but are not required to infer that a person ordinarily intends the natural and probable consequences of his acts. Motive is not an element of the crimes charged and need not be shown. However, you may consider the motive or lack of motive as a circumstance in this case. Presence of motive may be evidence of guilt. [65] Absence of motive may suggest innocence. You should give the presence or absence of motive, as the case may be, the weight you believe it deserves.

Now, you will recall that a third theory of murder asserted in this case by the State is the so-called depraved heart murder. Under this theory, murder is the killing of another person while acting with an extreme disregard for human life. In order to convict the defendant of murder on this theory, the State must prove, one, that the conduct of the defendant or of someone whom the defendant know-

ingly and wilfully aided and abetted caused the death of Mr. Williams, two, that the defendant's conduct or the conduct of someone who the defendant knowingly and wilfully aided and abetted created a very high degree of risk to the life of Mr. Williams, and, three, that the defendant or someone whom the defendant knowingly and wilfully aided and abetted was conscious of such risk and despite the risk acted with extreme disregard of the life endangering consequences.

Involuntary manslaughter is a lesser included offense as to this third so-called [66] depraved heart theory of murder. Involuntary manslaughter may be proved in one or both of two ways, a killing caused by a grossly negligent act or a killing caused by an unlawful act.

In order to convict the defendant of involuntary manslaughter on the basis of a grossly negligent act, the State must prove, one, that the conduct of the defendant or someone whom the defendant knowingly and wilfully aided and abetted caused the death of Mr. Williams, and, two, that the defendant or someone whom the defendant knowingly and wilfully aided and abetted, conscious of the risk, acted in a grossly negligent manner. That is, in a manner that created a high degree of risk to the life of Mr. Williams.

In order to convict the defendant of involuntary manslaughter on the basis of an unlawful act, the State must prove, one, that the defendant or another participating in the crime with the defendant committed an unlawful act, namely, battery as I will define that term, two, that a defendant or another participating in the crime killed Mr. Williams, and, three, that the act or acts resulting in the death of Mr. Williams [67] occurred during the commission of or as a direct result of the battery.

The defendants are charged with the crime of battery. Battery is committed where a defendant causes an unconsented to offensive physical contact or the infliction of physical harm on another without the victim's consent and without justification.

In order to convict the defendant of battery, the State must prove, one, that the defendant actually caused offensive physical contact or physical harm to Mr. Williams, two, that the defendant intended to bring about such contact or harm, and, three, that the defendant's actions were not legally justified or consented to by Mr. Williams.

Thus, the defendants are charged with three offenses. It will be your duty to return your verdict in the form of answers to the written questions which are being submitted by the Court. Your answers will constitute your verdict. Each answer is to be written or checked in the space provided after each charge listed on the verdict sheet. It is your duty to answer each of these questions in accordance with the evidence in the [68] case and in accordance with the instructions I have given you.

I will briefly review the verdict sheet with you at this time. There is a separate verdict sheet, ladies and gentlemen, for each of the defendants, Mr. Bell and Mr. Gray, and the verdict sheet is a one page document which lists the three charges that are available for you to consider in this case. They're identical in all respects.

The first charge listed on the verdict sheet is murder and you have the options of guilty or not guilty listed next to that charge. You will reach a unanimous verdict as to that charge and you will find that there is an instruction immediately below that charge listed on the verdict sheet. The instruction is consider charge number two only if your verdict on charge number one is not guilty.

In other words, as I've explained in the instructions, involuntary manslaughter, which is charge number two, is what the law calls a lesser included offense as to the third theory of murder. You will only consider involuntary manslaughter as a lesser included offense if your [69] verdict as to charge number one, murder, is not guilty.

Then you will consider, if appropriate and necessary, the involuntary manslaughter charge, and then after that there's another instruction. Consider charge number three only if your verdict on charge number two is not guilty.

Again, battery, the third listed charge, is a lesser included offense of murder and involuntary manslaughter, and so you will not consider battery unless you find not guilty as to the first two charges.

Once you have reached a unanimous verdict as to all of the charges you need to consider in accordance with my instructions, then your foreperson will sign the sheet and date it and will use the verdict sheet to deliver your verdicts here in open court in response to the questions based on the verdict sheet that will be put to the foreman by Ms. White, our courtroom deputy.

Thus, your verdicts, as I say, must be unanimous. All twelve of you must agree. They must, therefore, represent the considered judgment of each juror. When you go back to the jury room [70] to begin your deliberations, there may well be some disagreement among you as to the weight or significance of the evidence or as to what the ultimate verdicts should be.

That is not at all unusual and it should not concern you. Obviously, deliberation requires that there be a full discussion of any differences among you and you should discuss your differences with an open mind. Although you should make every reasonable effort to reach a verdict, if you cannot ultimately agree with your fellow jurors, regardless of how many may disagree with you, it is your duty to stick to your position.

Consult with one another, express your own views, and listen to the opinions of your fellow jurors. Do not hesitate to re-examine your own view, but do not change your opinion unless you come to believe it is wrong. Never refuse to change your position out of stubbornness or because you are tired of listening to your fellow jurors, but do not surrender your honest beliefs about the weight or effect of evidence because your fellow jurors disagree with you, because you want to get it over with, or for the sole purpose of returning a unanimous verdict. You are the [71] impartial judges of the facts. Your sole interest is

to return just verdicts by applying the law to the facts in accordance with these instructions.

Counsel, please approach.

* * * *

[77] THE COURT: All right, ladies and gentlemen, we will now have the closing argument of counsel. Ms. Saxon will proceed first and then you will hear from defense counsel, and then Ms. Saxon will have a final opportunity in rebuttal argument to address you. Ms. Saxon.

MS. STARKS-SAXON: Thank you, Your. Honor. Ladies and gentlemen, before I begin, on behalf of the State, the family of Stacey Williams, I'd like to thank you for your time and attention. This has taken a little time, but there was a lot involved in this case, a man died. He'll never be back here again and that is why we gave this our best effort in all of the time that we had to prosecute this for you.

I'm glad that you all were able to come everyday since we don't have an alternate. I'm glad that the alternate is here. So with that, I [78] will go on. I will get to come back to you twice since it's my burden. So I'll get to speak to you now. Then both of the defense counsel will get to speak to you, and then I will be able to come back and speak to you one more time.

So in my statement right now I may not cover—in fact, I will not cover everything. I will assure you that I'm not going to rehash everything that you have sat here and heard over the last few days because I don't want to insult your intelligence, but there are some things that I want to highlight for you and that's the purpose of this portion of the trial, okay.

Another thing I want to say, a lot of times when they teach us how to do trials we're taught to develop a theory of the case, some kind of angle, some kind of theme, something of that nature in which to present the case, and usually I can come up with that, but in this case all I can come up with was distress.

I was extremely distressed that a group of men could chase and then brutally beat to death a friend. This is 1994. This occurred November of 1993. I would like to think that at this point in time we wouldn't do those kind of things, but, [79] unfortunately, it goes on and went on in this case.

We heard the word stomped. They stomped him. How could they stomp their friend? How could six of them beat on this boy? He wasn't a big man. He was only about five seven, about a hundred fifty-three pounds. We know at least how big two of the people were and there were four more.

When he tried to get up and get away, Mr. Bell and Tank dragged him another way after he had been beaten. There was no mercy, no compassion, just a beating, not just a beating, but they kicked him about the head and threw him on the head, and then after that had been done, Mr. Bell went and kicked him again.

Was this a man? Was Stacey Williams a man? Was he an animal? Would you treat a dog like that? Would you let somebody treat a dog like that in front of you? No.

MS. GLANCY: Objection.

THE COURT: Overruled.

MS. STARKS-SAXON: And that distresses me, and, yes, he may have had drugs in his system when he got beat up. He may have been a drug [80] addict, but if he had lived past November 10th, we don't know what he might have done. How many of you in this room, including me, have done things that we don't want anybody to know about and but—

MR. AMARAL: Objection as to bringing the jury into it, Judge.

THE COURT: The State will confine its argument to the evidence. Go ahead, Ms. Saxon

MS. STARKS-SAXON: If this young man had lived, there's no telling what he might have done with his life, how he might have turned it around, but we'll never know

because these two young men, in conjunction with Tank and three other men that are still unknown, that are phantoms from some place other than this area, took his life, and the fact that he didn't die right there doesn't change it.

His death was imminent, meaning it was there. When he was taken from there, death was on the way. Death was on the way. It was on the way. He went into seizures at his girlfriend's house. In fact, he was brain dead on the 12th of November, the medical records say, and he died on the 13th. So that's why I tell you this is [81] distress.

In addition, these were his friends. Why didn't somebody say stop? No, they didn't have to.

MS. GLANCY: Objection.

THE COURT: Overruled.

MS. STARKS-SAXON: For example, if someone sees a beating on the street and they're not involved in it like the neighbors, if you notice Detective Pennington didn't issue arrest warrants for everybody on Wildwood Parkway, who was adjoining that area, who might have seen the beating, or even could have seen it. Shay didn't get arrested for watching this and not going over and stopping it because we don't have a duty as citizens to go help someone that is not connected to us.

Now, if his mother had been standing right up there and hadn't helped him, a different story, possibly. If that had been his wife—

MS. GLANCY: Objection.

THE COURT: Overruled.

MS. STARKS-SAXON: —watching a husband being brutalized, or a husband watching his children or his wife being brutalized, a [82] different story, but us people, if we see something going on, we don't have a duty to go and jump into it. If we do, that's wonderful, if we have the heart for it and if we'll willing to take the risk, but if we don't, the law doesn't condemn us for that. But in this case, these young men were not only friends of the victim, they were actively involved in the beating.

MS. GLANCY: Objection.

THE COURT: Overruled.

MS. STARKS-SAXON: And nobody—I have haven't heard anybody say, not even Mr. Bell in his statement, which was self-serving, that somebody said stop, hold up, wait a minute, don't throw him on his head, maybe we can work this out another way. And that's why it's important to prosecute these kind of cases, because when people know the law and the community is not standing behind them if they brutalize and kick a little Stacey Williams, whether he has drugs in his system or not, that the law and the community will not protect them because otherwise, if the law and the community don't step in lawlessness takes over, and this has got to stop.

This happened at ten-thirty in the [83] evening. Wildwood Parkway is a well-lit area with houses and a school. This occurred when people watched who live in that area. There's no evidence that these were vacant houses. We know at least one family was there, Shay's family. We know that they chased this boy through the community and beat him. Mr. Gray knocked Tracey out of the way, and as he was being beaten, he yelled out tell my girl, and one of the defense witnesses told us that. They didn't care because they were intent on kicking the devil out of him because he owed Tank some money and Tank was their boy and they were all part of the same group.

Madame State's Attorney, how does that relate to the charges? Well, let me tell you. I'm not an artist, but I'm just doing this to make a point.

THE COURT: Right there is fine.

MS. STARKS-SAXON: Oh, on this balloon, first. This is second degree murder. The defendant is not charged with first degree murder. First degree murder involves premeditation. We're not alleging that they planned, schemed, and then executed this boy, that they sat down and had a meeting about it and then [84] did it. We're not alleging that, but we're saying that it's second degree murder.

MR. AMARAL: Judge, I'm going to object as to the argument of the elements of the charges. The Court has already presented that in the jury instructions. I don't think it's within the province of the State to get into that.

THE COURT: The objection is overruled. Go ahead, Ms. Saxon.

MS. STARKS-SAXON: Now, second degree murder can be in any of these balloons. You can have an intent to kill. You can have an intent to inflict serious bodily harm, and then you can have depraved heart, meaning here.

Now, included in all of this is the act. We know that Stacey was beaten and we know he died from the beating, and how do we know that? The evidence from the State and defense tells you that he was beaten. Mr. Bell tells you in his statement that he was beaten. The witness, Shay, says there was a beating. The autopsy report tells you that there was a beating and that he died from the beating. So there's no question that that's what caused his death and that he died from it, and there's no question that it's a [85] homicide, meaning it's an unlawful death. He just didn't lay in his bed and die. He didn't get killed in an accident. His life was taken from him. We know that.

What I want to explain to you—and this is Stacey Williams. This represents his life. Intent to kill, and we know that actions were directed towards him, but what was the intention? One theory says, well, if the person did this action with the intent to kill and the person dies from it, he's guilty of second degree murder.

Now, when a person is doing something, they don't yell out, hey, you all I'm doing this with the intent to kill. No, they don't do that. They do the action, but as they do the action, their actions speak, as in actions speak louder than words. So, for example, if you walk into a room, you pick up a gun, you aim it at a critical portion of the person's body, say the upper body or the head and you shoot them, even if you miss, you know that when the person took a dangerous weapon and aimed at the head

and shot, that they intended to kill them, and if they didn't intend to kill them, they at least intended to inflict [86] serious bodily harm, because it was a weapon aimed at the head, okay. That's the way you read the intention.

Now, the intent to inflict serious bodily harm. If a person does something to another person, you can tell by their action what they're doing. For example, if they take a person, lift them up and aim their head towards the ground, they do that more than once, if a group of people go as a group, stomp the person, including kicking him about his upper body and head, you know that even if they thought they didn't have the intent to kill, they at least intended to kick his butt. They intended to hurt that boy. You know that.

And even if you say, well, I'm not sure about that, they acted with a cold blooded heart. They didn't care. They went to beat that boy and they didn't care what they did to him, and either one of these theories, the law says that's enough to elevate this to second degree murder.

Now, the other thing the law says is—you see these are all separate little strings—the law says these all come together as one under the theory of participation.

[87] MR. AMARAL: Objection, Your Honor.

THE COURT: The objection is overruled.

MS. STARKS-SAXON: If you personally do any of this or if you act with the person who did this, you are all guilty as one. So even if conservatively you say, well, I'm not sure what Mr. Bell did and I'm not sure what Kevin did, but everybody agrees, nobody in this room disputes what Tank did, and if those young men were acting with Tank, they, in essence, become little Tanks. They're all deputies of each other, and the fact that Tank may have beat him the worst doesn't excuse their conduct, and, therefore, whatever Tank is guilty of, they're all guilty of.

Another example is, if we went, or a group of people went to rob a bank, somebody stayed at the door, the front door, somebody walks to the back door, somebody

went in with the bag to hold the money, and somebody pulled the gun. Let's say the gun went off. Now, they all planned it. They all planned to share all of the money and get away. The gun goes off and the teller is deed. Who's guilty of the murder?

MR. AMARAL: Judge, I'm going to object. I think we need to approach. I think the [88] State is getting into felony murder instructions which are not part of this case. I would ask for a curative instruction and note my exception.

THE COURT: Well—

MS. GLANCY: I join it.

THE COURT: The exception of the defendants are noted. Ladies and gentlemen of the jury, I have instructed you on the law. My instructions on the law are binding upon you. Ms. Saxon or any attorney is free to argue within the bounds of propriety and to use illustrations to illustrate her point, and that is exactly what she is doing. This case, as you well know, does not involve a bank robbery. It does not involve a firearm. It does not involve a weapon of any kind, but attorneys are free to use illustrations to make the points that they wish to make. You may proceed, Ms. Saxon.

MS. STARKS-SAXON: Let me use another illustration. Again, I'm not an artist. Sheriff, would you help me, please.

You've heard the term posse. You've heard the term mob. If this group of people were angry at Tank, if one of the people in this group was angry at Tank and he got all of his buddies to [89] go to Tank's house late at night, get Tank out bed, drag him to the gallows and Tank pulled the thing and made him drop and he hung, and they all stood by there after they helped drag him out and saying, yea, yea, man, way to go, kill him, they're as guilty as the executioner because they participated.

Now, ladies and gentlemen, that's not a choice you have. That's the law, and all of you agreed to follow the law. Now, I don't care what they say. They can talk till

they're blue in the face. They can talk about Bell didn't do this. Kevin didn't do that. Under the law, if they participated, they aided and abetted, in this case they were all present, the Judge said they have to be present, they were there.

The judge said one eyewitness, if believed is enough. In this case, Tracey—everybody in this case knew one another. Nobody disputes that Tracey and Shay knew everybody at this table but Tank. Nobody says that they had an evil motive for talking about this.

Now, Mr. Amaral tried to say that Shay was a drug dealer. I mean, Shay was a drug addict, and all like that.

[90] MR. AMARAL: Objection, Your Honor.

MS. STARKS-SAXON: But Shay is captain of the tennis team.

THE COURT: The objection is overruled.

MS. STARKS-SAXON: Shay is captain of the tennis team and there's been no evidence introduced to show that that's not true. He came forward. He gave a statement to the detective. He signed the statement. He made an identification.

The other defense, anticipating what Shay was going to say, tried to develop a way to destroy his credibility. Marched an investigator in here who says, hey you all, take my word. I showed up seven months after the incident. I talked to a boy with his grandmother. I go in there with a badge and say talk to me. I write this report. I don't get him to sign it or anything. Don't let him review it, but I want you to take my word that what he told me is different than what he told the Homicide detectives down at Homicide.

If you believe the words of Shay and Tracey, then you've got to convict these two boys of second degree murder. They were all there. [91] They chased them. They beat him. Also, when you look at the autopsy report, Dr. Golle said, who was not involved, on the last page of his opinion. Now, he analyzes the different parts of the body and the different injuries, but he says in his

opinion this thirty year old black male, Stacey Williams, died of head injury which included injuries, plural, of the scalp and brain with secondary swelling. The pattern of injury indicates that Mr. Williams was struck at least twice on the left side of the face/head prior to his falling with the right side of the back of his head striking a hard surface resulting in severe injury to the brain. Investigation of the circumstances of this injury reveals that Mr. Williams was allegedly involved in the altercation during which he was struck, fell, and began having seizure. The manner of death is homicide.

He also says that he believes that it was the combined effect of all of this that killed him. Even the medical examiner that was there said he couldn't isolate one blow and say it was that blow that killed him. It was the combination of the blows.

I will come back to you, ladies and [92] gentlemen, after the defense.

THE COURT: Mr. Amaral.

MR. AMARAL: Thank you, Your Honor. When the trial started, I came up in front of you and I told you that you're going to hear evidence about what happened back on November 10th, 1993, and I told you that you're going to hear evidence about an argument over money between people who are together. The State calls them friends. They're a group, a gang, however you want to describe them. There was an argument over money. You can decide what the argument over the money was all about, okay.

The argument occurred and one person, Mr. Vanlandingham, also known as Tank, one person was the center of the argument, the fight, the conflict with Stacey Williams. That's beyond argument. That's the State's evidence. That's the defense evidence. That's the theory of the detective here.

Tank was the primary person who started the whole thing and I told you that you were going to hear evidence to show that his actions were the most serious actions against Stacey Williams, and you heard that evi-

dence. No one disputes that [93] Tank is the person who lifts this person up, Stacey Williams, and drops him on his head, one, two, three times. Beyond controversy, that happened. Everybody agrees to it.

You've got to decide whether or not the injuries that Stacey Williams received as a result of those blows to his head were what caused his death. You've got to decide that because the medical examiner is not sure. He can't say which injuries caused this person's death. Believe me, the medical examiner who was here, didn't even perform the autopsy, okay. He's just reading the notes of somebody else who did it.

So the best he can tell us is that he's not sure, that it may have been a contribution from all of the injuries. Well, what does that mean? I mean, does that mean if he had an injury on his arm that that may have in some way furthered the ultimate device of Stacey Williams? He died because he was dropped on his head three times in like a wrestling move that you see on television, okay, and, unfortunately, just, as you know, people in society today have become desensitized as to the effects of pointing a gun at somebody and shooting it, that this really does [94] cause an injury that can kill somebody.

People have also become desensitized to what they see on TV in the form of, you know, the wrestling that they see on T.V. because in wrestling, if you've ever had a chance to see it, and no one really wants to admit that they watch it, but you've probably come across it while you're turning the channels, and you have these big guys who are up there performing these orchestrated moves, which although they look like they're going to bring about somebody's death, nobody ever ends up dying as a result of them, right?

I mean, you know, as high as they pick somebody up, as hard as they kick somebody in the head, no one ends up dying as a result of that, and, unfortunately, there's people in society who have seen that and it has become something that sticks in their head. I can do this and nothing really serious is going to happen if I do this, and I don't know whether that was going through Tank's mind

or not when he was doing that, but there is no evidence to show that anybody intended to kill Stacey Williams. There's just no evidence.

[95] In fact, if you look at he facts of the case, all of the evidence points against that. Number one, the State is saying that Stacey is one of their friends. No argument, okay. People don't generally go out and want to kill one of their friends. What was this whole thing over? An argument over money. What was Tank trying to do? He was trying to teach Stacey, don't mess with the money, okay. Don't mess with the money, okay, and the lesson that he had to teach this guy, who was high on cocaine and heroin at the time, okay, words probably weren't going to work, he couldn't sit down with him across a table and say, look, Stacey, we're running a business here and you're taking money and if you do that, the business isn't going to succeed and, you know, it will hurt everybody, so please don't take the money, or whatever else is associated with the money.

I mean, that wasn't how this lesson was going to be taught, and Tank decided that his lesson was going to be to put this person down on his head, and this is how he is going to do it. Now, whether he was doing that because of some kind of macho kick to impress the people that were [96] on the corner of Normandy and Franklin, whether he was trying to impress those people with his ability to do this move, I have no idea, okay, but, you know, there wasn't an an intent to kill Stacey Williams.

There weren't any weapons used. This is somebody that they knew and, furthermore, I mean, if there was an intent to kill him, why didn't he finish the job? You know, why didn't he finish the job and kill him? Certainly, if there is an intention to do it, you finish it. If you don't finish it, it's because you don't intend to do it. I mean, that seems to be pretty clear cut, and, in fact, he wasn't killed when those activities occurred. He died days later.

And, believe me, nobody is trying to down play the tragedy of that person's death. I don't care if he's a drug

addict or not. I mean, it wouldn't matter to me if he was or if he wasn't. He died, and any time somebody's life gets taken away from them whether they're a criminal or not, it's not right. It's just not right, and so it doesn't really matter whose life is being taken. The taking of the life is wrong and no one is saying differently, okay, but what [97] we're talking about is who is responsible for it.

You know what I mean? Who is responsible for it, and who are you, as the jury, going to put responsibility on. And when you think that, I mean you really have to use the common sense that you all have. The evidence that you've heard is going to assist you in making that decision but ultimately you're relying on your common sense to figure out who's really responsible for this, and the State can talk about a theory of participation until tomorrow, okay.

The facts of the case are that there were two separate acts. There were two separate incidents. There was an incident that occurred on Wildwood where Anthony Bell admits he participated by hitting Stacey Williams in the chest once or twice, and he told that to you through the statement that he made to the police, and, you know, the State wants to use this statement to put him on trial.

Well, I'm elling you if the State believes the statement enough to be using it against Anthony Bell in this case, then you have to take the whole statement for what it is.

MS. STARKS-SAXON: Objection, Your [98] Honor.

THE COURT: Overruled.

MR. AMARAL: And the statement says clearly, and, by the way, the notes—remember the notes that I asked Detective Pennington about that he talked about with Anthony Bell before he actually wrote down the statement? The notes are the only place where it specifies that Anthony Bell tells the detective, yea, I hit him, I hit him once or twice in the chest. The State didn't want to put the notes into evidence.

MS. STARKS-SAXON: Objection, Your Honor.

MR. AMARAL: The State didn't—

THE COURT: The objection is overruled.

MR. AMARAL: The State didn't put the notes together with the statement that Anthony Bell made, and you're going to have a chance to see that it's not attached to it, and yet I knew that he had made those statements to Detective Pennington, and I asked Detective Pennington about it and Detective Pennington said he was cooperative. I asked him, did you think he was telling the truth? Yes.

How is it a self-serving statement, as [99] the State tried to describe it? How is it a self-serving statement when he's admitting that he hit the guy? I mean a self-serving statement, the way I understand it, would be if he said I didn't touch the guy? I didn't have nothing to do with it. That's a self-serving statement, because he's saying he's not involved in any way. It's far from that.

He's admitted his involvement. He has never denied his involvement. He told the detective, and through the detective he's told you what his involvement was, and his involvement was that on that Wildwood he hit this guy once or twice in the chest. That's it, and we know from the medical records that there were no injuries to Stacey Williams' chest or sternum or any area around here which contributed to his death. We know that because the doctor's statement is that the death was the result of serious head trauma.

So now we come to Shay Yarberough, and, you know, he testified. You have to believe a person's testimony or disbelieve it. You have to regard a person, look at them and decide whether or not they're credible or not, okay. That's your job. But my question about Shay Yarberough's [100] testimony, if he's such an all American kid, the tennis team captain, I mean, first of all, he's admitted that he is in the neighborhood and talks with these guys all of the time, if they're such bad seeds, why is this squeaky clean Shay Yarberough even associating with them?

And if he's so squeaky clean, why did he have to lie to you about talking to the Police Department before he

talked to Detective Pennington? I mean, what he's trying to hide?

MS. STARKS-SAXON: Objection.

MR. AMARAL: I mean if he's saying—

THE COURT: Overruled.

MR. AMARAL: —that the first time that he spoke to the police was when he gave the statement to Detective Pennington, and then he gives different information to the investigator who was called to testify—I mean, does the investigator, who is a state employee, have any motive to lie for these guys?

Come on, he's going to risk his career as a state investigator because he wants to protect these two guys? So you have to decide who you believe. Do you believe the detective, or the investigator rather, who testified, or do you [101] believe Shay Yarberough?

If you don't believe everything that Shay Yarberough said, that's okay. You don't have to believe or disbelieve everything that a person says. You can choose to believe part of what they say and disbelieve other parts of what they say, or if the person comes off as totally unbelievable, you can disregard their entire testimony.

Now, Shay Yarberough couldn't have seen the wrestling moves on Wildwood because they didn't happen there, they happened over here at the corner of Franklin and Normandy. That's where they occurred, and the testimony of Renardo Gardner verifies that, and there wasn't anything said or brought out to dispute Renardo Gardner's testimony. If the State wants to rely and try and harp on the fact that the three questions that Detective Pennington asked didn't elicit the same exact information that Gardner said over there on the stand, well I'm going to ask the State to be held to its own standard.

Did Detective Pennington write these questions out on a piece of paper and let Renardo Gardner read them, and then after reading them, [102] initial it, so, you know, we could make sure that this is exactly what he said and that he wasn't misunderstood. You know, come

on, let's play by the same rules, okay, because if she's going to make that big of a deal out of these statements that the investigator took weren't written down and allowed to be signed and double checked, well then she should be held to the same standard for the information that she's trying to get out of other witnesses. I mean, why should the State have any advantage or be treated any differently?

All we're asking for is a level playing field here. When you talk about involvement in murder, two parts of murder would involve intent and that the State would have to prove an intentional act on the part of Anthony Bell to kill somebody. They're nowhere near that. There's a third prong, a third way of showing this by bringing out that the defendant had an extreme disregard for human life, and when we look at the definition of this, the judge says that you to have look at whether or not the defendant's conduct caused the death. It didn't. So there's one prong shot out of there.

Two, that his conduct created a high [103] degree of risk. Punching him in the chest did not create a high degree of risk, okay. It may have been the criminal act of battery, and that's what we've asserted all along, but it didn't create a high degree of risk that would ultimately allow him to believe that this person was going to die. It didn't.

A third prong that he was conscious of the risk. Even if you're believing a theory of participation here, okay, that whatever Tank did later on down on Normandy and Franklin, that because somebody is involved in the first part of the conflict, which is on Wildwood, that they're all of a sudden going to be held responsible for what somebody else does two and a half blocks away, you have to show that Anthony Bell was conscious that what Tank did was going to cause this very serious problem, this very serious risk. He couldn't have been conscious of it because he wasn't down there. He wasn't down there.

There is no second degree murder theory here that will work. None of them fit into the instructions that the Judge gave you. So move down. You go down to involuntary manslaughter. [104] The Judge told you that's killing by an unlawful act, and that the unlawful act could, in fact, be the battery, okay, but that this act has to be grossly negligent and that the act has to actually cause the death of the victim.

So if you're looking at how this might fit into involuntary manslaughter, how Anthony Bell's conduct may fit into involuntary manslaughter, you have to look at what his act was. What did he do? If he had picked up a gun and shot it at his arm and it started bleeding, an artery that later on brought about his death, obviously, that's an act which could be considered involuntary manslaughter.

If he picked up a weapon or a piece of metal and swung it at his head, obviously, that's a situation where if the person died, it could be involuntary manslaughter.

THE COURT: Five minutes, Mr. Amaral.

MR. AMARAL: Thank you, Your Honor. If you look at what his actions in this whole thing were, striking this person in the chest once or twice, I have put it to you that that does not equal involuntary manslaughter. And the Judge told you, and I'm going to ask you to remember [105] this because this is probably the most important thing I think, that he instructed you on, he said that at the very beginning, what you do in this case is your responsibility. The decisions that you're going to make are your responsibility, not the State's responsibility. It's not mine.

You have to think and use your common sense and make a determination based on the evidence that you've heard as to whether or not the facts allow you to convict Anthony Bell of murder or involuntary manslaughter.

I put it to you this way. There's a place there for battery. You have a place on your verdict sheet for

battery. The judge told you what battery was. An unconsented to offensive contact without the victim's consent.

What does the State have to show? Number one, that Anthony Bell caused this contact. Number two, that Anthony Bell intended to do it. Number three, that his actions were not justified in any way and that it wasn't like a self-defense kind of reaction, okay. The definition for battery is exactly what Anthony Bell did.

I told you that at the beginning of the [106] case. It's what he admitted to back in January. He is guilty of committing a battery against Stacey Williams and nothing else, and he's admitted that to you. He has not tried to say he's not guilty of anything. He has admitted to you that he's guilty of battery. The facts support his being responsible for a battery against Stacey Williams. They support nothing else.

I'm going ask that when you go back to the jury room to deliberate that you think about everything that you've seen in terms of the evidence, but then go back and rely on your common sense. Rely on what's upstairs here when you make this decision, and make the right decision. He's guilty of battery. He's not guilty of murder. He's not guilty of involuntary manslaughter.

THE COURT: Ms. Glancy.

MS. GLANCY: Ladies and gentlemen, I thank you for your kind attention that you have given in this case. Kevin Gray is not a murderer. He didn't batter anybody. He didn't beat anybody. He didn't pummel anybody. He didn't DDT anybody, whatever that means, and, ladies and gentlemen, that's what the evidence has [107] always been.

Kevin Gray is a seventeen year old boy. Unfortunately, he wanted to be a big shot. So he was hanging out with a guy named Tank. Need I say more as to where the nickname Tank probably came from, and he's hanging out with the same people Tank hung out with. He was hanging out with Mr. Bell, his cousin. Mr. Bell

is a little older than Kevin. He had just turned seventeen when he got charged with this murder.

He wanted to be a big shot. He wanted to hang out with the boys, and, ladies and gentlemen, that's probably what was going on in Shay Yarberough's mind, also. He wanted to be one of the boys, but he wasn't, and he didn't have a cousin that was one of the boys. So he wasn't in with the boys.

Now, what Mr. Amaral said to you about a level playing field I'm going to say a little bit about, and I'm going to try not to rehash what the State's Attorney and Mr. Amaral already said and what the Judge has instructed you.

The instructions you've received on the law apply to both men. You have to decide their cases separately. However, the law is the same. [108] Now, to quote a real estate agent, there are three important things in real estate, location, location, and location, and, ladies and gentlemen, here the State couldn't even prove location.

Mr. Gray was charged with a murder in the 500 block of North Louden on November 10th. The State's Attorney presented all of this evidence on Wildwood, and if you don't think where it happened was important, ask yourself why the Judge has given an instruction as to what alibi means. If you're not at the place where a crime took place, you're not guilty of that crime.

And just like Shay Yarberough isn't charged with certain things, Kevin is not charged with anything conceivable that he may be guilty of, if you are to believe he's guilty of anything. The State makes their election.

The State's Attorney told you that she was taught in school you should have a theory of prosecution. Ladies and gentlemen, the State's Attorney doesn't have enough confidence in her case to pick a theory of second degree murder. She's giving you three hoping one of them sticks. That's absurd.

The State's Attorney told you how sick [109] this scenario made her and how distressed it made her. Well,

ladies and gentlemen, this case has distressed me, too. To sit next to a seventeen year old boy who is naive enough to believe the truth will set him free, as long as he gets up and he tells you the truth, nothing can possibly happen, but, ladies and gentlemen, that is not reality. People get found guilty of things they didn't do, and if you don't believe that, ask Kirk Bloodsworth.

He told you just what he told the police. He told this detective, man, I didn't have anything to do with it, and the State tries to put a twist on it like, oh, oh, he said he wasn't present. You'll get that statement. The State introduced it. The statement went, man, and I'm adding the man part, man, I wasn't present with Duke and with Tank. I was on the phone.

Now, if this young man wanted to make up a story after being left in an interview room for a couple of hours, don't you think he would have come up with something a little bit better, a little bit juicier, like, hey, I wasn't there at all. I wasn't anywhere in the vicinity. Go ask my girl, she'll tell you. But, no, what he said [110] was, I was on the phone.

I asked Kevin, did the detective ask you any other questions after that? He said no. Well, this is a detective. He investigates. Why didn't he ask who were you on the phone with, what's her number, I'll go check it out, I don't believe you.

Now, you saw if that wasn't an accurate statement, you saw the State's Attorney recall the detective after Mr. Amaral and I were done putting on evidence that we did not have to put on. It's the State's burden from start to finish, and just as it is their burden, they decide what they want to put in and what they don't.

And isn't it interesting that the detective told you the information received in the beginning was Tank and another individual beat up Stacey. Mr. Bell told you, he's being honest here, yea, I helped a little, I punched. Does that rise up to the level of intending to kill some-

body? Well, you already heard from Mr. Amaral. That's not it, but where does Kevin fit in?

Now, some months later Shay Yarberough, after being told, yea, man, we know you know more, [111] we know you were there, we know you're not telling us everything. Well, then he starts to twitch. Then he says, hey, man, yea, yea, okay, okay, now I know everything. This is how it all went down, and the State's Attorney made a big point of telling you his momma didn't want him in here. Now, who cares? Well, I bet Shay did, and why wouldn't his momma want him in here? Because maybe she knows from grandmom—

MS. STARKS-SAXON: Objection, Your Honor.

THE COURT: Confine your argument to the facts.

MS. GLANCY: The evidence is grandmother was there when Mr. Schatz talked to this boy. Mr. Schatz is not going to risk a conviction for impersonating a police officer. The State's Attorney says, you told him you were a police officer. No, ma'am, I showed him my badge. I gave him my business card. You didn't tell him that he didn't have to talk to you, did you? Yes, I did. And where in this statement does it say that he ever told you this? Well, I think he said line fifty-three, page thirteen.

Mr. Schatz is a professional. Now, you [112] didn't see us trying to slam and bang the detective here and say, oh, he's, you know, running around impersonating somebody. He's doing his job. Mr. Schatz is doing his job and, ladies and gentlemen, the Judge told you somethink very, very important about participation.

There has to be a willful intent to facilitate, to participate. The State's Attorney, I was wondering if she would ever get around to that element because she kept talking about if you're there, if you're there, why didn't you stop this fight. Well, for goodness sake we're talking about a seventen year old and he's supposed to jump in the middle of a fight between a thirty year old man and someone named Tank? He didn't want to get his head beaten in. Does that make him a criminal? He had no duty.

I was surprised with the State's Attorney telling you that if Tank's momma had been out there, or if Stacey's momma had been out there, it would have been a different story. Ladies and gentlemen, there's no general obligation because you're related. If you see a small child that's your child being abused—

MS. STARKS-SAXON: Objection, Your [113] Honor.

THE COURT: Overruled. Go ahead.

MS. GLANCY: —that is different, because you have a legal duty to that child. Kevin had no legal duty. His girl came in here. You could see she was nervous, but did she twitch? Did she flounder? The State's Attorney goes, well, when you talked to us you weren't sure what the time was, but now you're saying between nine and eleven. Ladies and gentlemen, that's a distinction without a difference. You say I'm not sure what time it is, but I know it was between nine and eleven. You're not stating an exact time.

There's something else that was interesting that the State brought up on cross examination. Well, didn't Kevin tell you that nobody got injured, and she said, yea, that's what he had told me. Well, that makes sense. That's what he said that night because by all of the testimony, all of the medical records, Stacey got up. He walked home. There was no bleeding, no big cuts. You're going to get the autopsy pictures, which, frankly, do not depict what he looked like after he got into the fight. They [114] show the surgery scar, but what you don't see are these big like, you know, if you skin your knee or something, if you scrape your head on the sidewalk, that's going to show up.

If you bang your head, if you're slammed into the sidewalk, that's going to show up, but there were no visible signs. Stacey walked home. Look at those medical records. It wasn't even for four hours after the fight that it even occurred to anybody, maybe you ought to see if this man got hurt as a result of a fight he was in.

Now, we're not saying that to slander this man, but those are the facts. He didn't have visible signs. He was

treated by a paramedic. He was taken to the hospital. He was under a doctor's care. None of these professionals knew he had been in a fight. He was being treated for an overdose, and we don't tell you that to say he was a bad person or he deserved this, but to tell you, you have to look at the objective facts in this case, and the objective facts are Kevin was on the phone.

Not only did Kevin's witnesses say he was on the phone, Mr. Bell's witness said he was on the phone. You might have noticed I didn't ask [115] him that question. He wasn't my witness. I didn't know what he'd say, but the State's Attorney asked, well, where was Kevin, and, boy, was I happy when I heard him say Kevin was on the phone.

Now, the State's Attorney had her chance. She talked to Chanel. Chanel wasn't trying to hide anything. She is young and naive, too. She honestly believes if you come in and you tell the truth, no harm can come to you. Ladies and gentlemen, I'm asking you to uphold that.

Kevin took the stand. He didn't have to take the stand, and when the State's Attorney was cross examining him, I purposely tried not to get involved because the truth doesn't change. Lies change. Shay Yarberough's story changed. Like my grandmother told me, the truth doesn't change.

Kevin has said since the word jump, I was on the phone. Hey, here it is, I'm not holding back, detective, ask me questions, I'm not even asking for my momma, the heck with asking for a lawyer. This is a seventeen year old.

Now, Shay, let's go back to Shay again. Why might Shay have talked up all of these different things? Well, you know, it's a little [116] more intimidating when you are dragged down to Homicide. You're talking to a detective. Now, he wanted to say, Yo, I only talked to one detective and I can't remember specifically the point where it was brought up, but I think it was on the State's Attorney's questioning. Oh, yea, I did talk to

another detective, Detective Pennington about another case.

MS. STARKS-SAXON: Objection, Your Honor.

MS. GLANCY: So ask yourself—

THE COURT: I think you did make a mistake there, Ms. Glancy, but the jury's recollection of the evidence will control its deliberations.

MS. GLANCY: But, you know, it was not disputed at all when Shay talked to Mr. Schatz. He was at home. He was at home with his grandmother. He was in a nice safe environment. He didn't have to talk to anybody. When he's in Homicide, oh, a totally different story. He's in a room. There's him and a cop, no grandmom. That puts a different light on things, and then he says, well, you know that night, me and my mom went over to LeJuan's house. Where's momma to [117] back that up? Maybe that's why momma didn't want him in here because she knows she didn't go over that night.

MS. STARKS-SAXON: Objection, Your Honor.

THE COURT: Confine your argument to the evidence.

MS. GLANCY: You don't have to leave your common sense at the door. You've seen what the evidence is, and, ladies and gentlemen, nobody has shaken, but Kevin has told you what the truth is.

The State's Attorney chose what witnesses she was going to put on. Now, the detective told you when the case was initiated we heard about two people, count them, one, two, Tank, Anthony Bell. Where does Kevin fit in? He does not. The State didn't think that the detective should have to a elaborate on that, okay, whatever.

Why didn't the State's Attorney call the officer that took the initial report? Testimony came out that Shay's name was given by LeJuan Robinson. Why didn't LeJuan ever testify? You pick and choose. You don't want to blow your own [118] case, and I'll tell you, why, why would it be necessary to get someone to sign a statement?

As Mr. Amaral pointed out very well, the State's Attorney wanted to bring up other things, well, didn't

you tell our detective this and there wasn't a signed statement. That's true. There are lots of reasons why you might not sit down and type up a signed statement, but another reason is, if you have no reason to believe the person is going to come in and bold face lie and tell a completely different version of the facts than they told you in the safety and comfort of their own home, that's a pretty good reason why you don't bother getting out your typewriter, getting the guy to come down, getting the guy to sign it.

Five years captain of his tennis team. He's in the seventh grade. You think maybe he's prone to a little bit of free imagination?

THE COURT: Three minutes, Ms. Glancy.

MS. GLANCY: Two hundred pounds, he doesn't get bossed around by anybody. Did he look like a two hundred pounder? Where was he when the detective said he was knocking on the doors all along where this happened? Where was he then? Nowhere. But when he's told, hey, we can put you [119] there after he's picked out pictures of family members. He told you that on the stand. That was not disputed.

Well, that might give you a reason why you want to pull somebody into it who's not related. Nobody wants to get up and fry their own family. It's a lot easier to say bad stuff about somebody that you're not real friends with and he told you he had known Stacey a lot longer.

Another reason might be guilt. The State said, hey, hey, hey, you heard it. You heard it. Stacey said Shay call my girl, call my girl, but Shay didn't call his girl. Shay went inside. Then Shay finds out later Stacey is dead.

Ladies and gentlemen, there's no disputing it is a tragedy that a man died, but don't compound the tragedy by convicting a seventeen year old boy with the murder of a thirty year old man that he did not have any part in whatsoever, and if the State is sick about this case, I can't blame her, but, ladies and gentlemen, I'm scared to death.

I can't stand the thought of not just one, but another life getting cut off now.

[120] This is a seventeen year old boy who laid himself wide open to all of you and said, come on State cross examine me. I saw you beat up on my girlfriend, but I'm still—I want that jury to hear from my mouth, I didn't do this. Ladies and gentlemen, you cannot render any other verdict against Kevin except not guilty.

THE COURT: You have ten minutes, Mrs. Saxon.

MRS. STARKS-SAXON: Thank you, Your Honor. Ladies and gentlemen, I can't address every point because I don't have the time. So I'm going to pick the main ones. This is Stacey. This is the bruise to Stacey's face. Head injuries that go through the scalp. The doctor in the autopsy describes the injuries, but even when you hit somebody in the head, you may not see the injury yourself. He even said like when you hit somebody from the back, it will injury the brain in the front. That's why when you hit somebody in the head it's a tricky place. This is the way he looked when he went to the hospital.

Now, they say, they being the defense, that we just made all of this up. But prior to the defendant getting on the stand was there any [121] evidence whatsoever that any of this had occurred down here? All of the information, all of the investigation indicated the beating occurred over here.

This only came up when the defense put on their case. They put on a cousin of one of the defendants, a good friend of one of the defendants, a girlfriend who didn't see anything. Gardner said he didn't see anything. Montgomery said he didn't—Lamont said he didn't see anything, and Kevin said he wasn't even there.

I suggest to you, ladies and gentlemen, something did start down here because Tracey saw them run past her on Wildwood from that direction. That's why I put her back on to clarify that, and the defendant says in his statement that they chased him. In fact, he told her to get out of the way, and they ran over here. So probably

something happened down here. I don't know exactly what, but they ran from that direction.

None of these people have said that Tracey was lying, and they talk about a level playing field, okay. Let's take Detective Pennington's statement the last time I brought him [122] in. Let's do that. We have a signed statement from Shay.

THE COURT: The statement is not in evidence.

MS. STARKS-SAXON: It's not in, but you saw it. We have a signed statement from him that he gave the detective and we have the report of a man that talked to him several months later. Now, if the defense was so confident that Shay was lying, they could have brought in the police supposedly that he talked to. They brought in Detective Neverdon. The police are not just State's witnesses. They come whenever they're summonsed.

MS. GLANCY: Objection.

THE COURT: The objection is overruled.

MS. STARKS-SAXON: They brought in Detective Neverdon. They could have brought in the first officer. They could have brought in anybody that they wanted.

MR. AMARAL: Objection.

THE COURT: The objection is overruled. As I've instructed the jury, there is no burden on the defense, but the argument is a proper one. Go ahead, Ms. Saxon.

[123] MS. STARKS-SAXON: So let's be clear about what's going on here. I asked Shay face to face if what he said to him was true, and you can evaluate his credibility. Now, if they were so confident that what he said was a lie and that he told the truth, why didn't they bring the grandmother in? She has to respond to a summons just like anybody else.

MS. GLANCY: Objection.

THE COURT: Overruled.

MS. STARKS-SAXON: And, ladies and gentlemen, you just don't rely on the State's witnesses. Mr. Bell, Mr. Bell tells you, an argument broke out between Tank and Stacey in the 500 block of Louden Avenue, somewhere down here. Stacey got smacked and then ran onto Wild-

wood. Me and a few other guys ran after Stacey. Me, and he was identified by Tracey, Kevin was identified by Tracey and Shay as being in the pack, and he was identified and he put himself there.

We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up, we walked him back to Louden Avenue and then I walked over and used the phone. Stacey and the others walked down Louden. Now, that is his [124] statement that he signed that you will look at.

So if you don't believe me, if you don't want to believe the witnesses, believe him, because Mr. Amaral wants you to believe that all he did was hit him, and if he wants you, he said, to accept the whole statement, well accept the whole statement.

He used the the word theory. Participation is not a theory. Participation is the law, and he said, he said they were trying to teach him a lesson. Don't mess with money, we're running a business. The lesson they were trying to teach was, by example, if you mess with our money, this is what will happen to you, and they kicked the mess out of that boy. They beat him unmercifully and that was the example to everybody in the group, everybody in the neighborhood, if you mess with our money, this is what will happen to you. That was the lesson.

And if you take somebody—and you noticed in the autopsy and the medical records the injuries were about the head. Now, if this went on for twenty minutes and they stomped and kicked him, where were the injuries inflicted? Of the head. There wasn't anything on the body. He was [125] picked up and thrown on the head, and then after that happened, he went over and kicked him in the head. They were all there. They all participated. You don't have to itemize which blow. It was a combination of blows.

He said why didn't we put the notes in. This is a court of law. Judge Davis makes sure that we all play fairly. We introduced the statement because that's what he

adopted. That's what he said he did, and nobody can argue with that.

Mr. Amaral could have had Detective Pennington introduce his notes. I wouldn't have objected. He didn't move them in.

MS. GLANCY: Objection.

THE COURT: Overruled.

MS. STARKS-SAXON: So it wasn't like we were hiding them. We gave you something that we thought was the best evidence, which was something Mr. Bell signed. If we had introduced the notes, he would have said Mr. Homer Pennington made them up.

Now, he says, how is this self-serving? Self-serving meaning I'm trying to play down, I'm helping myself. The way this is self-serving is [126] he says all I did was hit him. I didn't see anybody drop him on the head. Well, see, if he said, yea, I stood there and as I was beating him, I see Tank pick him up and knock him on the head and then I come over and kick him too. If he said that, that puts him in deeper than he wants to be. So he says, no, I just hit him. That's it. That's how it is self-serving.

Now, ladies and gentlemen, there's something else, just one other thing. He went on talking about everything happened down here, Mr. Amaral, but did you hear him slip when he said Wildwood? I made a note of it. It happened on Wildwood. Something started down here, but it ended up there, and it finished at the hospital.

Now, these are the charges that are on the sheet, and voluntary manslaughter—the reason we don't think this is involuntary manslaughter is because we think of involuntary manslaughter as something that's grossly negligent, like somebody rolling down the street in a car just shooting randomly and killing somebody or somebody driving—

MR. AMARAL: Objection, Your Honor.

MS. STARKS-SAXON: —down the street in [127] a reckless manner.

MR. AMARAL: Objection as to the characterization of that as being involuntary manslaughter.

THE COURT: The objection is overruled.

MS. STARKS-SAXON: Or if you create an unlawful act, let's say you hit somebody, you hit them, and it turns out that they had an egg shell skull. Some people have very delicate skulls, and if you hit them where you might hit another person they wouldn't die and this person would die, that's involuntary manslaughter, and battery, of course, if I hit the stenographer, that's a battery because I intended to do it. That's a battery. If she hit me back, she would batter me.

This, ladies and gentlemen, is not in that class. This was an intentional, vicious act that they all participated in. The reason why I went through all of the theories is I wanted to show you that under all of them or any of them they fit regarding second degree.

THE COURT: You have about one minute.

MS. STARKS-SAXON: Thank you, Judge. Ladies and gentlemen, I just want to finish with [128] this. Mr. Bell gave you a statement that was self-serving. Kevin Gray gave you a statement that was self-serving. Shay didn't have anybody's interest to serve, nor did Tracey, nor did Detective Pennington, and this man died.

I ask you, please, bring back a verdict that reflects what they did because that's what they deserve.

* * * *

[Typewritten Version of Handwritten Redacted Statement, State's Exhibit 5B]

(REDACTED STATEMENT)

This is a statement of Anthony Bell, taken on 1-14-94 at 0925 hrs in the small interview room. Statement taken by Det. Pennington and Det. Ritz.

(Q) Is your name Anthony Bell

(A) Yes

(Q) Are 19 years old and your date of Birth is 6-17-74

(A) Yes

(Q) Can you read and write

(A) Yes

(Q) Are you under the influence of alcohol or drugs

(A) No

(Q) You were explained your Explanation of Rights, do you fully understand them

(A) Yes

(Q) Are you willing to answer questions without an attorney present at this time

(A) Yes

Anthony Bell

[Page -2-]

Bell, Anthony

(Q) Has anyone promised you anything if you answer questions

(A) No

(Q) What can you tell me about the beating of Stacey Williams that occurred on 10 November 1993

(A) An argument broke out between and Stacey in the 500 blk Louden Ave Stacey got smashed and then ran onto Wildwood Parkway. Me , and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up we walked him back to Loudon Ave I then walked over and used the phone. Stacey and the ohters walked down Loudon

(Q) When Stacey was beaten on Wildwood Parkway, how was he beaten

Anthony Bell

[Page -3-]

Bell, Anthony

(A) Hit, kicked

(Q) Who hit and kicked Stacey

(A) I hit Stacey, he was kicked but I don't know who kicked him

(Q) Who was in the group that beat Stacey

(A) Me, , and a few other guys

(Q) Do you have the other guys names

(A) , and me, I don't remember who was out there

(Q) Did anyone pick Stacey up and drop him to the ground

(A) No when I was there.

(Q) What was the argument over between Stacey and

Anthony Bell

[Page -4-]

Bell, Anthony

(A) Some money that Stacey owed

(Q) How may guys were hitting on Stacey

(A) About six guys

(Q) Do you have a black jacket with Park Heights written on the back

(A) Yeh

(Q) Who else has these jacket.

(A) ,

(Q) After reading this statement would you sign it

(A) Yes

Anthony Bell

Det. William F. Ritz *Det. Homer Pennington*

(UNREDACTED STATEMENT)

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[redacted]

(Q) Are you under the influence of Alcohol or Drugs
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(Q) You were explained your Explanation of Rights, Do you fully understand them
(A) Yes

(Q) Are you willing to answer questions without an attorney present at this time.
(A) Yes

[redacted]

Anthony Bell

57

B.11, Anthony

(Q) Has anyone promised you anything if you answer questions

58

(A) No

(Q) What can you tell me about the beating of Stacey Williams that occurred on 16 November 1993

(A) An argument broke out between Tank and Stacey in the South London Ave Stacey got smacked and then ran out. Widwood Parkway. Me Tank, Kevin and a few other guys ran after Stacey. We caught up to him on Widwood Parkway. We beat Stacey up After we beat Stacey up we walked him back to London Ave I then walked away and used the phone. Stacey and the others walked down London

(Q) When Stacey was beaten on Widwood Parkway, How was he beaten

Initials K.

Bell, Anthony

(A) Hit, kicked

(Q) Who hit and kicked Stacey

(A) I hit Stacey, he was kicked but I don't know who kicked him

(Q) Who was in the group that beat Stacey

(A) ME, Tank, Kevin and a few other guys

(Q) Do you know the other guys NAMES

(A) Tank, Kevin and me, I don't Remember who was out there.

(Q) Did anyone pick Stacey up and drop him to the ground

(A) No when I was there.

(Q) What was the argument with between Stacey and Frank

Anthony B.

59

Bell, Anthony

(Q) Some money that Stacey owed Tank

(Q) How many guys were hitting on Stacey

(A) About six guys

(Q) Do you have a black Jacket with Pink Heights written on the back

(A) Yeh

(Q) Who else has these jackets

(A) Tank, Kevin

(Q) After Reading this statement, would you sign it

(A) Yes

x Anthony Bell

Det. William Fogg Det. Howard Leonard

**[Typewritten Version of
Handwritten Unredacted Statement, State's Exhibit 5A]**

(UNREDACTED STATEMENT)

This is a statement of Anthony Bell, taken on 1-14-94 at 0925 hrs in the small interview room. Statement taken by Det. Pennington and Det. Ritz.

(Q) Is your name Anthony Bell

(A) Yes

(Q) Are 19 years old and your date of Birth is 6-17-74

(A) Yes

(Q) Can you read and write

(A) Yes

(Q) Are you under the influence of alcohol or drugs

(A) No

(Q) You were explained your Explanation of Rights, do you fully understand them

(A) Yes

(Q) Are you willing to answer questions without an attorney present at this time

(A) Yes

Anthony Bell

[Page -2-]

Bell, Anthony

(Q) Has anyone promised you anything if you answer questions

(A) No

(Q) What can you tell me about the beating of Stacey Williams that occurred on 10 November 1993

(A) An argument broke out between Tank and Stacey in the 500 blk Louden Ave Stacey got smashed and then ran onto Wildwood Parkway. Me Tank, Kevin and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up we walked him back to Loudon Ave I then walked over and used the phone. Stacey and the ohters walked down Loudon

(Q) When Stacey was beaten on Wildwood Parkway, how was he beaten

Anthony bell

[Page -3-]

Bell, Anthony

(A) Hit, kicked

(Q) Who hit and kicked Stacey

(A) I hit Stacey, he was kicked but I don't know who kicked him

(Q) Who was in the group that beat Stacey

(A) Me, Tank, Kevin and a few other guys

(Q) Do you have the other guys names

(A) Tank, Kevin and me, I don't remember who was out there

(Q) Did anyone pick Stacey up and drop him to the ground

(A) No when I was there.

(Q) What was the argument over between Stacey and Tank

Anthony Bell

[Page -4-]

Bell, Anthony

(A) Some money that Stacey owed Tank

(Q) How may guys were hitting on Stacey

(A) About six guys

(Q) Do you have a black jacket with Park Heights written on the back

(A) Yeh

(Q) Who else has these jacket.

(A) Tank, Kevin

(Q) After reading this statement would you sign it

(A) Yes

Anthony Bell

Det. William F. Ritz *Det. Homer Pennington*

(REDACTED STATEMENT)

This is a statement of Anthony Bell taken on 1.14.94 at 0915 hrs in the small interview room Statement taken by DA Pennington and Det. Rigg.

(Q) To begin, Anthony Bell
(A) Yes.

(Q) And I see that your date of birth is 1.17.74
(A) Yes.

(Q) Can you read and write.
(A) Yes.

[redacted]

(Q) And you're under the influence of alcohol or drugs
(A) No

(Q) You have certain rights. You understand these rights, do you? Full understanding them
(A) Yes.

(Q) And you're willing to answer questions without an attorney present at this time.
(A) Yes.

Anthony Bell

Form 11/27

65

Bill Arthur.

(Q) Has anyone phoned you with
if you answer questions

(A) No

(Q) What can you tell me about the
beating of Stacey Williams that
occurred on 18 November 1993

(A) An argument broke out between
Lou Sloan and Stacey in the 5th
Lou Sloan and Stacey got smashed and
this was outside Willowood Parkway. Me
and a few other guys Ran
after Stacey. We caught up to him
on Willowood Parkway. We beat Stacey
up After we beat Stacey up we
walked him back to Lou Sloan As I
then walked onto and used the phone.
Stacey and the others walked down
Lou Sloan

(Q) When Stacey was beaten on
Willowood Parkway, How was he beaten

Arthur R

Bill, Anthony

(1) Hit, knocked

(2) Who Hit and knocked Stacey
(3) I hid Stacey, he was knocked
but I did hear who knocked
him

(4) Who was in the gym that
beat Stacey.
(5) Me, , and a few
other guys

(6) Do you know the other guys
names?
(7) , and me I just
Remember who was out there

(8) Did anyone pick Stacey up
and drop him to the ground
(9) no when I was there.

(10) What was the argument with
between Stacey and .

Anthony R.

67

Page 4

Bell Antonia

(H) Jane must that Thomas over

(G) How many cups was Arthur

Thomas

(B) Not six cups

(G) Do you have a black Jacket with

Pink Heights written on the back

(M) Yes

(G) Who else has their jacket

(M)

(G) After reading this statement

you sign it

(A) Yes

Anthony Bell

Det. William F [illegible] Det. Hamilton

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 244

SEPTEMBER TERM, 1995

KEVIN D. GRAY

v.

STATE OF MARYLAND

FISCHER,
CATCHELL,
HOLLANDER,
JJ.

Opinion by Cathell, J.

Filed: December 4, 1995

Appellant, Kevin D. Gray, was convicted by a jury in the Circuit Court for Baltimore City of involuntary manslaughter. The court committed appellant to the custody of the Commissioner of Correction for a period of ten years, with all but seven years suspended. Appellant presents two issues for our review, which we rephrase as follows:

> 1. Did the trial court err in admitting into evidence the redacted statement of appellant's codefendant that implicated appellant in the crime?

2. Did the trial court abuse its discretion when it substituted an alternate juror for a designated juror during trial?

After a review of the relevant facts and law regarding the first issue, we shall reverse appellant's conviction and remand to the trial court. We do not reach appellant's second issue.

Six young men were involved in the beating death of Stacey Williams on November 10, 1993. Investigation of the incident prompted the authorities to arrest Anthony Bell, who gave a written statement implicating himself, appellant, and Jacquin Vanlandingham (also known as "Tank") in Williams's death.[1] These three individuals were the only ones identified by name as having been involved in the beating.

Appellant and Bell were scheduled to be tried jointly. Prior to trial, appellant moved to sever his case from Bell's, or, in the alternative, to exclude Bell's statement from their joint trial. The court denied appellant's motion to sever and ordered that appellant's and Tank's names be redacted from Bell's statement. Bell declined to testify.

At trial, Tracey Brumfield placed appellant at the scene of the crime. She testified that she saw appellant, Tank, and several others chase Williams down the street. Shay Yarberough actually witnessed the beating. He testified that he saw Tank kick and punch Williams several times and pick Williams up over his head and throw him head first onto the sidewalk three times. He also testified that he saw appellant attempt to pick Williams up over his head and drop him on the sidewalk. Detective Homer Pennington of the Baltimore City Homicide Unit testified that he was assigned to the case and, in the course of his investigation, interviewed Bell. During the

[1] Tank was fatally shot two days after the incident.

interview, Bell, gave a written statement implicating himself, appellant, and Tank in Williams's beating. The State was permitted to read the statement into evidence at trial, but as previously stated, was required to redact the names of appellant and Tank therefrom; the words "deletion" and "deleted" were inserted in place of the redacted names. A copy of the statement was also introduced into evidence and blank white spaces marked the places where the names of appellant and Tank had been redacted. We shall address the actual reading of the statement before the jury, *infra*.

Appellant testified in his defense. He stated that he was talking to his girlfriend on a nearby pay phone at the time of the beating. Several other witnesses were called in appellant's defense. Renardo Bell testified that he saw Tank pick up Williams and throw him down, but he did not see appellant in the group. Lamont Matthews also testified that appellant was not in the group of people that had gathered around and beat Williams; that appellant was at a phone booth about half a block up the street. Chanel Brown, appellant's girlfriend, stated that appellant had called her from a pay phone and that appellant had said that Tank was up the street fighting. The jury found appellant guilty of involuntary manslaughter. He filed this timely appeal from that conviction.

Appellant seeks resolution of a question left unanswered by the United States Supreme Court in *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620 (1968), and *Richardson v. Marsh*, 481 U.S. 200, 107 S. Ct. 1702 (1987): whether the introduction of a nontestifying codefendant's inculpatory statement, which is redacted to exclude the names of all those involved in the crime by using the words "deleted" and "deletion," and the reading of that statement before a jury, violates a defendant's rights under the Confrontation Clause of the Sixth Amendment, even if the jury is instructed to consider the statement only against the codefendant-confessor. We hold

that, under the circumstances of this case, it does not reverse. We explain.

The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 1068 (1965), guarantees the right of an accused "to be confronted with the witnesses against him." The right of confrontation includes the right of cross-examination. Thus, "where two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other unless the confessing defendant takes the stand." *Richardson*, 481 U.S. at 206, 107 S. Ct. at 1707.

In *Bruton, supra*, Bruton and Evans were charged with armed robbery. Both were convicted after a joint trial, at which a postal inspector, to whom Evans had confessed his involvement and Bruton's complicity, testified thereto. The trial court duly instructed the jury to disregard the confession in determining Bruton's guilt or innocence and to consider it as competent evidence only against Evans. The Supreme Court began its discussion by noting what had been the Court's premise up to that point: that "it [was] 'reasonably possible for the jury to follow' sufficiently clear instructions to disregard [a] confessor's extrajudicial statement that his codefendant participated with him in committing the crime." 391 U.S. at 126, 88 S. Ct. at 1622 (quoting *United States v. Delli Paoli*, 352 U.S. 232, 239, 77 S. Ct. 294, 299 (1957)). The problem with adhering to this principle had earlier been indicated by the dissent in *Delli Paoli*. Justice Frankfurter spoke for the four dissenters:

> [T]oo often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors . . . and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell. . . . The Government

> should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.

352 U.S. at 247-48, 77 S. Ct. at 303.

While recognizing the efficacy of joint trials, the *Bruton* Court also acknowledged that the potential for abrogation of a defendant's constitutional right of confrontation was a "hazard" that could not be ignored. 391 U.S. at 137, 88 S. Ct. at 1628 (quoting *Jackson v. Denno*, 378 U.S. 368, 389, 84 S. Ct. 1774, 1787 (1964)). Though the Court suggested the possibility that "viable alternatives" existed to achieve both the benefit of admission of the statement and the protection of a nonconfessor's right of confrontation, it stated that, when a confessor does not take the stand at trial and his confession is introduced into evidence, there is a "substantial risk that the jury, despite instructions to the contrary[will] look[ ] to the incriminating extrajudicial statements" in determining the guilt or innocence of the nonconfessing codefendant, in violation of that defendant's Sixth Amendment right of cross-examination. *Id.* at 126, 88 S. Ct. at 1622; *see also Jackson*, 378 U.S. at 389, 84 St. Ct. at 1787. Limiting instructions were perceived by the Court as not being "an adequate substitute" for a codefendant's constitutional right of cross-examination: "The effect is the same as if there had been no instruction at all." 391 U.S. at 137; 88 S. Ct. at 1628. The *Bruton* Court then held, as we indicated, that, because of the "substantial risk" that the jury would consider an incriminating confession against the confessor's codefendant despite limiting instructions, the confession cannot be admitted in evidence unless the codefendant has the opportunity to cross-examine the confessor.

As stated, *Bruton* acknowledged that which the *Delli Paoli* dissenters had broached, *i.e.*, the possibility that a jury may not follow a curative instruction to disregard

a confession in determining the guilt or innocence of a confessor's codefendant. Indeed, in *Delli Paoli*, the Court had sanctioned the use of limiting instructions. It was not until *Bruton* that the Court fully acknowledged that it was not realistic to assume that juries would follow the instruction once privy to information implicitly or explicitly inculpating the confessor's codefendant. 391 U.S. at 126; 88 S. Ct. at 1622. One approach suggested by the Court, that had been in use in several states, was the practice of deleting, or redacting, any references to the codefendant from the statement being introduced.

This practice was challenged in *Richardson v. Marsh*, *supra*, where the Supreme Court declined to extend *Bruton* and upheld the practice whereby the codefendant's name, as well as her existence, were eliminated and a curative instruction was given at the time the statement was admitted and again when the jury was charged. Over her objection, Clarissa Marsh and one Benjamin Williams were jointly tried on charges of murder, robbery, and assault.[2] At trial, the State successfully introduced a confession the police had elicited from Williams following his arrest. It had been redacted to omit any reference to Marsh—in fact, as read into evidence, it appeared that no one other than Williams and Martin had participated in the crime.[3] At the time that the redacted confession was

[2] A third suspect, Kareem Martin, was a fugitive at the time of the trial.

[3] Williams's redacted confession in its entirety read:

> "On Sunday evening, October the 29th, 1978, at about 6:30 p.m., I was over to my girl friend's house at 237 Moss, Highland Park, when I received a phone call from a friend of mine named Kareem Martin. He said he had been looking for me and James Coleman, who I call Tom. He asked me if I wanted to go on a robbery with him. I said okay. Then he said he'd be by and pick me up. About 15 or 20 minutes later Kareem came by in his black Monte Carlo car. I got in the car and Kareem told me he was going to stick up this crib, told me the place was a numbers house. Kareem said there would be over $5,000 or $10,000 in the place. Kareem said he would have to take them out after the robbery. Kareem had a big silver gun. He gave me a long barrelled [sic] .22 revolver. We then drove over to this house and parked the car across the big street near the house. The plan was that I would wait in the car in front of the house and then I would move the car down across the big street because he didn't want anybody to see the car. Okay, Kareem went up to the house and went inside. A couple of minutes later I moved the car and went up to the house. As I entered, Kareem and this older lady were in the dining room, a little boy and another younger woman were sitting on the couch in the front room. I pulled my pistol and told the younger woman and the little boy to lay on the floor. Kareem took the older lady upstairs. He had a pistol, also. I stayed downstairs with the two people on the floor. After Kareem took the lady upstairs I went upstairs and the lady was laying on the bed in the room to the left as you get up the stairs. The lady had already given us two bags full of money before we ever got upstairs. Kareem had thought she had more money and that's why we had went upstairs. Me and Kareem started searching the rooms but I didn't find any money. I came downstairs and then Kareem came down with the lady. I said, 'Let's go, let's go.' Kareem said no. Kareem then took the two ladies and little boy down the basement and that's when I left to go to the car. I went to the car and got in the back seat. A couple of minutes later Kareem came to the car and said he thinks the girl was still living because she was still moving and he didn't have any more bullets. He asked me how come I didn't go down the basement and I said I wasn't doing no shit like that. He then dropped me back off at my girl's house in Highland Park and I was supposed to get together with him today, get my share of the robbery after he had counted the money. That's all."

Richardson v. Marsh, 481 U.S. 200, 205 n.1, 107 S. Ct. 1702, 1705 n.1 (1987).

admitted, the court instructed the jury not to consider it in any way against Marsh. With the confession redacted, the only evidence that linked Marsh to the crime was: 1) Marsh's own testimony, in which she admitted that she was in the car with Williams and Martin while driving to the victims' house, and 2) Williams's confession

that, while driving to the victims' house, he and Martin discussed their intent to rob and kill the victims. Marsh alleged that *Bruton* was dispositive of her claims; that introduction of Williams's confession violated her constitutional rights under the Confrontation Clause. The Court held that the admission of William's confession with the proper limiting instruction had not impinged upon Marsh's right of confrontation because the confession did not name her as a perpetrator of the crime or indicate that she was in any way involved in it. *Richardson*, 481 U.S. at 211, 107 S. Ct. at 1709. Rather, it was her own testimony, placing her in the same car with Williams and Martin while they discussed their intent to rob and kill the victims, that tied her to the crimes.

The Court explained that, in *Bruton*, it had recognized a "narrow exception" to the general assumption that jurors follow the instructions given to them. Where a confessing codefendant does not take the stand, the Court opined, "the risk that the jury will not . . . follow instructions is so great, and the consequences of failure so vital to the [nonconfessing] defendant" that it would not presume that jurors, under those circumstances, would follow instructions. 481 U.S. at 207, 107 S. Ct. at 1707 (quoting *Bruton*, 391 U.S. at 135, 88 S. Ct. at 1627)). Under the facts presented in *Richardson*, where the references to Marsh were redacted, Williams's confession was only inferentially incriminating—that is, incriminating only when linked with other evidence adduced at trial. In such a circumstance, "the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget." *Id.* at 208, 107 S. Ct. at 1708. The same can not be said for confessions that specifically reference a codefendant's complicity in the perpetration of the crime, such as that evinced in *Bruton*. There, Evans's confession directly implicated Bruton as a perpetrator. It was precisely this type of confession that prompted the Court to

carve out its exception: "Specific testimony that 'the defendant helped me commit the crime' is more vivid than inferential incrimination, and hence more difficult to thrust out of mind," the Court opined. 481 U.S. at 208, 107 S. Ct. at 1708. There did not, in *Richardson*, "exist the overwhelming probability of the [jurors'] inability to [disregard the incriminating inference] that is the foundation of Bruton's exception to the general rule." [4] *Id.*

While holding that Marsh had been accorded her constitutional rights, the Court stated, however, that it expressed "no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." *Richardson*, 481 U.S. at 211 n.5, 107 S. Ct. at 1709 n.5. Indeed, neither the Supreme Court nor any Maryland appellate court has ever addressed the constitutional ramifications of replacing a defendant's name with a symbol or neutral word in an incriminating statement made by a codefendant.

Surveying other jurisdictions that have faced this issue, we find persuasive the reasoning and analysis employed by the D.C. Court of Appeals in *Smith v. United States*, 561 A.2d 468 (1989), wherein a symbol was used in the place of Smith's name in his codefendant's redacted statement to police. There, Smith and one Harris were tried together on a number of robbery charges. Harris had confessed prior to trial and named Smith as his accomplice. Prior to its admission, Harris's confession was redacted "by 'witing out' all references to Smith and then penciling a rectangular boundary around each remaining blank space." 561 A.2d at 473. Fourteen such rectangular symbols appeared on Harris's two-page confession. In

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[4] The Court then went on to detail the problems inherent in applying the *Bruton* exception to only inferentially inculpatory evidence: "If extended to confessions incriminating by connection, not only is [compliance with *Bruton* by redaction] not possible, but it is not even possible to predict the admissibility of a confession in advance of trial." *Richardson*, 481 U.S. at 209, 107 S. Ct. at 1708.

reviewing its impact upon Smith's Sixth Amendment rights, the D.C. Court of Appeals said:

> [A] properly and effectively redacted statement substituting neutral references for names (including nicknames and the like) and/or descriptions . . . may be admitted into evidence at a joint trial (when coupled with proper limiting instructions) unless a 'substantial risk' exists that the jury will consider that statement in deciding the guilt of the defendant. *In order to determine whether a substantial risk exists, the trial court must consider the degree of inference the jury must make to connect the defendant to the statement and the degree of risk that the jury will make that linkage despite a limiting instruction.* The trial court's assessment as to whether the redaction effectively avoids linkage with the defendant must be made in the context of other evidence admitted at trial.[5]

Id. at 474 (emphasis added; citations and quotations omitted; omission in original). The court then held that, in light of the other evidence adduced at trial, there was a substantial risk that the jury had relied on Harris's confession in determining Smith's guilt; the jury was "virtually invited . . . to use Smith's name to 'fill in the blanks.'" *Id.*

In the case *sub judice*, in moving the trial court to sever appellant's trial from Bell's, appellant defense counsel argued:

> Mr. Bell's statement, in its totality and in various parts, clearly is indicating a group activity in the beating death of Mr. Stacey Williams.
>
> Therefore, it can only be inferred when these two gentlemen are sitting at the same defense table, that

[5] This approach is known as the contextual analysis of *Bruton* questions.

> when [Bell] was implicating . . . himself, that he . . . must have implicated Mr. Gray.
>
> Because we have no right to cross examine Mr. Bell as to his statement, Your Honor, I believe that the entire statement must be excluded, or in the alternative a severance must be granted. I think *Bruton* makes it clear that the reason for the red line type rule announced in *Bruton* was because of the fact that [appellant] would be denied his right to confrontation, and it would be a logical inference drawn by a jury that if one client made a statement concerning a group activity and two people are on trial for that group activity, by implication the statement goes to the detriment of Mr. Gray . . . .

The trial court denied the motion:

> It seems to me . . . that there is not a difficulty here with a statement which involves two people where we redact the name of the defendant who is making the motion, that there's going to be this compelling implication to the jury that the name that's been redacted or left out must be the name of the co-defendant.
>
> To the contrary, I think that where you've got group activity and the evidence here is, apparently, going to be that there were at least five, and maybe as many as six men involved in this assault on the victim, to redact this statement, it seems to me, will not unduly prejudice Mr. Gray.
>
> It seems to me that this statement can be sanitized in about three different spots so as to remove the names of Tank and Mr. Gray and the jury will not be left with the unavoidable inference or implication that the person Mr. Bell is referring to in the statement is Mr. Gray.
>
> . . . .

. . . I just don't see any prejudice befalling Mr. Gray if we can adequately sanitize this statement and take out any indication from Mr. Bell contained in this statement of the identity of anybody else who was involved in the assault. Not just Mr. Gray's name, but we're going to take out all of the names because the evidence is going to be that there were six people involved, and, therefore, to take out all of the names, that will not hurt Mr. Gray, it seems to me.

[APPELLANT'S ATTORNEY]: Well, Your Honor, the jury only has one other person to choose from because there are not five or six people on trial.

THE COURT: Oh, no. Well, I'll instruct the jury that the involvement or alleged involvement, or if the evidence seems to suggest that others are involved, obviously, they're not to consider that the others involved are not on trial. They should not speculate as to why others said to have been involved are not on trial. They are to consider only the evidence against each of the defendants in reaching their verdicts, and, of course, I would instruct the jury that they are not to consider Mr. Bell's statement as evidence against Mr. Gray . . . . But I think that the redaction of the statement together with the instructions will avoid any prejudice to Mr. Gray.

[APPELLANT'S ATTORNEY]: The whole proposition of *Bruton* is that such a limiting instruction will not work in this type of situation.

THE COURT: . . . I made this ruling, of course. In addition to the fact that, according to the State's proffer, there will be eyewitness identification of both defendants as among the six who committed the deadly assault on Mr. Williams.

[APPELLANT'S ATTORNEY]: Yes, but if the witnesses, if they do identify Mr. Bell and Mr. Gray as being among those six individuals, and then add

to that a statement where Mr. Bell states that he was involved in the beating—

THE COURT: It makes the case against Mr. Bell simply stronger than Mr. Gray.

[APPELLANT'S ATTORNEY]: And it makes the case against Mr. Gray stronger.

THE COURT: I don't think so. I don't think so.

[APPELLANT'S ATTORNEY]: Because two people are named, one of them admits, oh, yes, I was involved, that clearly makes the evidence of that one witness appear more believable, and that witness is stating that two people were recognized.

THE COURT: I understand your position. Your motion for severance is denied.

Detective Pennington read Bell's redacted statement to the jury. In pertinent part, that which was read included:[6]

> Question, what can you tell me about the beating of Stacey Williams that occurred on 10, November, 1993?
>
> Answer, an argument broke out between *deletion* and Stacey in the 500 block of Louden Avenue. Stacey got smacked and then ran onto Wildwood Parkway. Me, *deleted*, and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up, we walked him back to Louden Avenue. I then walked over and used the phone, Stacey and the others walked down Louden.

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[6] Prior to the statement being read into evidence, the court admonished the jury that the statement

> is to be considered . . . as evidence against Mr. Bell only and in no way is . . . [it] to be considered . . . as evidence against Mr. Gray. It is evidence against Mr. Bell only, and . . . you will consider the evidence against each of the defendants individually and reach a separate verdict as to each defendant.

Question, when Stacey was beaten on Wildwood Parkway, how was he beaten?

Answer, hit, kicked.

Question, who hit and kicked Stacey?

Answer, I hit Stacey. He was kicked, but I don't know who kicked him.

Question, who was in the group that beat Stacey?

Answer, me, *deleted, deleted,* and a few other guys.

Question, do you know the other guy's name?

Answer, *deleted, deleted,* and me. I don't remember who was out there.

Question, did anyone pick Stacey up and drop him to the ground?

Answer, no, when I was there.

Question, what was the argument over between Stacey and *deleted*?

Answer, some money that Stacey owed *deleted*.

Question, how many guys were hitting on Stacey?

Answer, about six guys.

Question, do you have a black jacket with Park Heights written on the back?

Answer, yea.

Question, who else has these jackets?

Answer, *deletion*.

Question, after reading this statement, would you sign it?

Answer, yes. He then signed it. [Emphasis added].

In reading the statement to the jury, where the written version indicated "deleted" and "deletion," Detective Pennington spoke the words "deleted" and "deletion."

Evidence otherwise directly implicating appellant in the commission of the crime came from two individuals—Tracey Brumfield and Shay Yarberough. Brumfield, a witness only to the chase, testified that appellant and Tank were among a group of twelve young men chasing Stacey

Williams down the street, approximately ten to twelve feet behind him. She did not recognize the others in the group, getting only a four to five second glance at all of them as they passed approximately six feet in front of her. She admitted that she knew Tank and appellant were friends and were frequently seen together. She did not recognize Bell as one of the men chasing Williams. She stated that she then ran into Yarberough and that the two walked to the house of Williams's girlfriend. Yarberough testified that he witnessed Williams's beating from across the street and could only name Tank, appellant, and Bell as among the six individuals involved in the fray. He then described how Tank and appellant hit Williams and dropped him on his head several times. Bell was also seen hitting Williams. On cross-examination, however, it was revealed that, among other inconsistencies, Yarberough had apparently provided a statement to the police different from his testimony at trial, in which he stated he saw the altercation but did not know the identities of those involved in it.

In determing whether Bell's statement was sufficiently redacted, the trial court had to assess *Bruton's* "substantial risk" criterion in light of the degree of inference the jury would have had to make to connect appellant to Bell's statement and the degree of risk that the jury would have linked the two despite a limiting instruction. *See Smith,* 561 A.2d at 474.

Mere deletion of appellant's (and Tank's) name did not effectively make Bell's statement nonincriminating as to appellant. In the context of other evidence (Brumfield's and Yarberough's testimony), the jury need only have taken a short step in inferring that appellant was one of those involved. Stated otherwise, it did not have to make a substantial inference that appellant was the person neutrally referenced in the redacted statement. Therefore, there existed a "substantial risk" that the jury considered

the statement in deciding appellant's guilt. Indeed, with Tank dead, the jury was "virtually invited . . . to use [appellant]'s name to 'fill in the blanks.'" *Id.* Simply stated, the use of "deleted" or "deletion" was insufficient to protect appellant against "the practical and human limitations of the jury system." *Bruton*, 391 U.S. at 135, 88 S. Ct. at 1627. *See also Greenwell v. United States*, 336 F.2d 962, 969 (D.C. Cir. 1964) (replacing name of defendant with neutral term such as "named person" insufficient redaction since "with other evidence . . . connecting the co-defendants in the commission of the crime, it is difficult to believe that the jury was unable to divine who the 'anonymous nobody' referred to in the confession was"), *cert. denied*, 380 U.S. 923, 85 S. Ct. 921 (1965). Although, as the State argues, there were six perpetrators, any one of which the jury could infer was referred to by the deletions, only three were positively identified—Bell, appellant, and Tank. Appellant's role was clearly demonstrated by Bell's statement, rendering it facially incriminating and constitutionally violative. "To hold that there was not a substantial risk that the[jury] would consider th[e] evidence . . . in considering [a codefendant]'s guilt (limiting instruction or not) would require us to wink at the reality of human behavior of jurors as recognized by the Court in both *Bruton* and *Richardson v. Marsh.*" *Foster v. United States*, 548 A.2d 1370, 1379 (D.C. App. 1988).

Thus, the instant case represents a point on the continuum between *Bruton* and *Richardson* "where one cannot have the requisite degree of assurance that the jury will not improperly consider the evidence in deciding the guilt of the defendant against whom the evidence is not admissible despite a proper limiting instruction." *Foster*, 548 A.2d at 1378. We add further that we distinguish *Richardson v. Marsh* by the manner of redaction employed. In *Richardson*, Marsh's role in the perpetration

of the crime had been totally eliminated. There was no indication that anyone other than Williams and Martin committed the crime. In the instant case, however, appellant's role was disclosed, albeit with references to a neutral person. Bell was not portrayed as solely having assaulted Williams and the jury could reasonably infer that it was appellant whose name had been "deleted."

Given our conclusion that there existed a violation of appellant's constitutional rights, we now subject that violation to further analysis to determine whether it was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 22-23, 87 S. Ct. 824, 826-27 (1967) (Not all constitutional errors mandate reversal). Maryland courts employ a harmless error analysis in addressing federal constitutional errors. See *Adam and Green v. State*, 14 Md. App. 135, 144 (1972), *Shedrick and Beckwith v. State*, 10 Md. App. 579, 585 (1970), and *Hamm, Lee, Bailey, and Cole v. State*, 7 Md. App. 474, 484 (1969) in the context of Sixth Amendment *Bruton*-type issues. As set forth in *Chapman*, 386 U.S. at 24, 87 S. Ct. at 828, and restated in *Harrington v. California*, 395 U.S. 250, 254, 89 S. Ct. 1726, 1728 (1969), whether an error is harmless beyond a reasonable doubt "is to be based on an independent 'reading of the record and on what seems . . . to have been the probable impact . . . [of the tainted evidence] on the minds of an average jury.'" *Younie v. State*, 272 Md. 233, 246 (1974) (quoting *Harrington*, 395 U.S. at 254, 89 S. Ct. at 1728) (omissions and brackets in original). In other words, a constitutional error is not considered harmless if there is a reasonable possibility that improperly admitted evidence contributed to the conviction being challenged. *Schneble v. Florida*, 405 U.S. 427, 432, 92 S. Ct. 1056, 1060 (1972). Unless the State can prove that the defendant would undoubtedly have been found guilty in the absence of the allegedly tainted evidence, its use will always be error. *Younie*, 272 Md. at 246-47. If, on the

other hand, the State can show beyond a reasonable doubt that the violation is technical or the evidence cumulative of other overwhelmingly inculpatory evidence, no error will be found. *Id.* at 247.

In *Harrington v. California, supra*, the Supreme Court granted *certiorari* to determine whether admission of the statements of Harrington's codefendants, in violation of *Bruton*, nonetheless was harmless beyond a reasonable doubt, as sanctioned in *Chapman v. California, supra*. In *Harrington*, four men were jointly tried on robbery and murder charges. The respective confessions of Harrington's three codefendants were introduced at trial, tempered by appropriate limiting instructions.[7] Harrington's own testimony, as well as that of the testifying confessor, placed Harrington at the scene of the crime. Though varying, accounts of his possession of a gun and the extent of his participation in the commission of the crime were elicited from other witnesses. The Court began by recognizing *Chapman*'s axioms that no federal constitutional error is harmless unless held to be harmless beyond a reasonable doubt and that not all constitutional errors call for reversal of a petitioner's conviction. 395 U.S. at 251-52, 89 S. Ct. at 1727. The Court concluded that, in that case, harmless error existed despite clear *Bruton* violations, even in spite of the cumulative nature of the nontestifying codefendants' confessions, "[b]ut apart from them," because the other evidence "was so overwhelming." *Id.* at 254, 89 S. Ct. at 1728. The Court further rejected the suggestion that, if the mind of one juror was tainted by the violative confessions, reversal was mandated. Its judgment, the Court opined, "must be based on our own reading of the record and on what seems to us to have been the probable impact of the two confessions on the minds of an average jury." *Id.*

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[7] One of the confessors took the stand and, thus, was subject to defense counsels' cross-examination.

In the case *sub judice*, we are not persuaded by the State's assertion that the testimony of Brumfield and Yarberough, in addition to that of the medical examiner,[8] were "substantial evidence" of appellant's guilt so as to render a *Bruton* violation, if any, harmless beyond a reasonable doubt. In view of the conflicting evidence of appellant's presence *vel non* at the scene, the jury may well have considered Bell's statement to have enabled the State to overcome its burden of proof beyond a reasonable doubt. If so, it may have resulted in appellant's conviction. Simply because other evidence tends to inculpate a defendant does not render the use of a codefendant's statement, admitted in violation of *Bruton*, harmless beyond a reasonable doubt. Indeed, the testimony of the witnesses on which the State relies may not have been compelling at all in the minds of the jurors. Brumfield was not herself a witness to the altercation that resulted in Williams's death and Yarberough's allegedly differing statements could have adversely affected his credibility. Bell's statement "might well have tipped the balance in the jurors' minds in favor of conviction." *Harrington*, 395 U.S. at 257, 89 S. Ct. at 1730 (Brennan, J., dissenting). We are unable to hold that the use of Bell's statement, which we have determined violated appellant's right to confrontation, did not result in appellant's conviction.

Thus, we hold that the statement was ineffectively redacted and its use at the joint trial deprived appellant of his right of confrontation. We further hold that it was not harmless beyond a reasonable doubt. Accordingly, we reverse and remand for a new trial.

JUDGMENT REVERSED; COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.

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[8] The medical examiner testified that Williams died as a result of trauma to his head, such as caused by being struck on a hard surface.

IN THE COURT OF APPEALS OF MARYLAND

No. 15

September Term, 1996

STATE OF MARYLAND

v.

KEVIN D. GRAY

BELL, C.J.
ELDRIDGE
RODOWSKY
CHASANOW
KARWACKI
RAKER
MURPHY, ROBERT C.
(retired, specially assigned)
JJ.

Opinion by Karwacki, J.
Bell, C.J. & Eldridge, J., dissent

Filed: January 15, 1997

The issue presented in this case is whether the introduction of a nontestifying codefendant's confession implicating a defendant and others, which is redacted to exclude the names of all those involved in the crime, other than the confessor, by using the words "deleted" and

"deletion," violates a defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution, even if the jury is instructed to consider the confession only against the codefendant-confessor? We shall hold that under the circumstances in this case it does not and reverse the judgment of the Court of Special Appeals.

I.

Stacey Wiliams was beaten on November 10, 1993, by a group of six young men. Within a few hours, Williams died from his injuries. Following a preliminary investigation, the police arrested Anthony Bell. In a written statement to police, Bell implicated himself, Jacquin Vanlandingham, and Kevin Domonic Gray, the Petitioner, as participants in the beating. Vanlandingham was fatally shot two days after Williams' death, and Gray was arrested one day later. These three individuals were the only ones identified by name in Bell's statement to police as those involved in the murder, although evidence adduced at trial suggested that as many as six persons participated in the attack on Williams.

Bell and Gray were scheduled to be tried jointly in the Circuit Court for Baltimore City. Prior to trial, however, Gray moved to sever his trial from Bell's, or alternatively to exclude his confession from evidence. The trial court denied both motions but ordered the redaction of Gray and Vanlandingham's names from Bell's confession.

At trial, the State presented the testimony of Tracy Brumfield, Shay Yarberough, and Baltimore Homicide Detective Homer Pennington. Brumfield testified that she saw Gray, Vanlandingham, and several others chase Williams down the street. Yarberough, the only witness to Williams' beating, testified that he saw Vanlandingham lift Williams over his head and drop him on the sidewalk.

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[7] We do not mean, nor is there any evidence in the record, to suggest that Vanlandingham and Williams' murders are related.

Yarberough also testified that Gray attempted the same maneuver, albeit less successfully, and along with the other five members of the group, including Bell, repeatedly kicked Williams about the ribs, neck, and head.

Detective Pennington testified that his investigation led him to arrest and interview Bell. In the course of that interview, Bell formally confessed to participating in the beating of Williams, implicating both Gray and Vanlandingham in the process.

The State was permitted to read Bell's confession into evidence over his objection, but, as indicated, *supra*, was concomitantly required to redact the names of Gray and Vanlandingham, and insert in their place, the words "deletion" or "deleted." A copy of the redacted confession was admitted into evidence with blank white spaces indicating where the names of Gray and Vanlandingham had been.

Unlike Bell, Gray testified in his own defense, claiming that he was speaking with his girlfriend on a public telephone when the fray ensued. Chanel Brown, Gray's girlfriend, testified that he had called her from a telephone booth and, during that conversation, said that Vanlandingham was fighting. Defense witness Lamont Mathews testified that although he had witnessed Williams' beating, he placed Gray at a telephone booth "up the street" during the melee. The jury nonetheless convicted Gray of involuntary manslaughter, for which he was sentenced to ten years imprisonment with all but seven years suspended.

Gray appealed that judgment to the Court of Special Appeals, claiming that the introduction of Bell's redacted confession violated his Sixth Amendment right to confrontation, and was contrary to the holding in *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). The intermediate appellate court agreed and reversed Gray's conviction. *Gray v. State*, 107 Md. App. 311, 667 A.2d 983 (1995). We granted the State's Petition for a Writ of Certiorari.

II.

In the trial of every criminal case, state or federal, a defendant has the right "to be confronted with witnesses against him." U.S. Const. amend. VI; *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 1068, 13 L. Ed. 2d 923, 926 (1965) (Sixth Amendment made applicable to states through Fourteenth Amendment); *Smallwood v. State*, 320 Md. 300, 306, 577 A.2d 356, 359 (1990); *Harris v. State*, 306 Md. 344, 361, 509 A.2d 10, 128 (1986). Implicit in this principle is the right to cross-examine those witnesses. *Pointer*, 380 U.S. at 406-07, 88 S. Ct. at 1069-70, 13 L. Ed. 2d at 928; *Smallwood*, 320 Md. at 306, 577 A.2d at 359.

In *Bruton v. United States, supra*, the United States Supreme Court held that the admission of a nontestifying codefendant's pretrial confession implicating another codefendant by name, violated that defendant's Sixth Amendment confrontation right, notwithstanding an instruction to the jury to disregard the confession in determining the nonconfessing defendant's guilt.[8] Bruton was tried and convicted along with one Evans, who, during the preceding investigation, orally confessed to a postal inspector that he and Bruton perpetrated an armed postal robbery. The postal inspector subsequently testified to Evans' confession. The trial judge duly instructed the jury that the confession was competent evidence against Evans only and was not to be used in assessing Bruton's innocence or guilt. The Supreme Court nevertheless reversed Bruton's conviction.

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[8] The "*Bruton* Rule" was extended to state court proceedings in *Roberts v. Russell*, 392 U.S. 293, 88 S. Ct. 1921, 20 L. Ed.2d 1100 (1968).

[9] The relevant portion of the judge's instruction advised the jurors that:

> "A confession made outside of court by one defendant may not be considered as evidence against the other defendant, who was not present and in no way a party to the confession. Therefore, if you find that a confession was in fact voluntary

In so doing, the Court repudiated its previous position that " 'it is reasonably possible for the jury to follow' sufficiently clear instructions to disregard the confessor's extrajudicial statement that his codefendant participated with him committing the crime." *Bruton*, 391 U.S. at 126, 88 S. Ct. at 1622, 20 L. Ed. 2d at 479 (quoting *Delli Paoli v. United States*, 352 U.S. 232, 239, 77 S. Ct. 294, 299, 1 L. Ed. 2d 278, 284 (1957)). The reason for the departure, articulated initially by the *Delli Paoli* dissent, was that:

> "too often such admonition against misuse [of a co-defendant's confession] is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collection of words and fails of its purpose as a legal protection to defendants . . . . The Government should not have the windfall of the jury being influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.

352 U.S. at 247-48, 77 S. Ct. at 302, 1 L. Ed. 2d at 288 (Frankfurter, J., dissenting).

The Court acknowledged three arguments supporting the use of limiting instructions in this area, namely the probative value of the confession, judicial economy, and the integrity of the jury system itself, but categorically rejected the first two. While the confession may be the best evidence of the confessor's guilt, alternative ways exist to allow the State the benefit of the confession without infringing upon the nonconfessing defendant's constitutional rights. *Bruton*, 391 U.S. at 133-34, 88 S. Ct. at

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and intentionally made by the defendant Evans, you should consider it as evidence in the case against Evans, but you must not consider it, and should disregard it, in considering the evidence in the case against the defendant Bruton.

1626, 20 L. Ed. 2d at 483-84. The use of redactions is but one example. *Id.* at 134 n.10, 88 S. Ct. at 1627 n.10, 20 L. Ed. 2d at 484 n.10.

Similarly, joint trials conserve state resources by avoiding the necessity of duplicate proceedings, reduce inconveniences to witnesses, and accelerate the judicial process. *Id.* at 134, 88 S. Ct. at 1627, 20 L. Ed. 2d at 484. Nevertheless, fundamental constitutional rights, such as the right of confrontation, are seldom sacrificed upon the altar of judicial efficiency. *Id.* at 135, 88 S. Ct. at 1627, 20 L. Ed. 2d at 484.

Turning to the third argument in support of limiting instructions, the Court acknowledged that inadmissible evidence inevitably finds its way before the jury, but that reliance on the jury's ability to perform its role is justified under many circumstances. *Id.*, 88 S. Ct. at 1627, 20 L. Ed. 2d at 484. In those instances, "[i]t is not unreasonable to conclude . . . [that] the jury can and will follow the trial judge's instructions to disregard such information. *Id.*, 88 S. Ct. at 1627, 20 L. Ed. 2d at 484-85. When, however,

> "the powerfully incriminating extrajudicial statements of a codefendant who stands side-by-side with the defendant, are deliberately spread before the jury in a joint trial . . . the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure [are] so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."

Id. at 135-36, 88 S. Ct. at 1627, 20 L. Ed. 2d at 485. The Court concluded that:

> "despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating [Bruton], in the context of a joint trial, we

cannot accept limiting instructions as an adequate substitute for [Bruton's] constitutional right of cross examination . . . . The effect is the same as if there had been no instruction at all."

Id. at 137, 88 S. Ct. at 1628, 20 L. Ed. 2d at 485-86.

III.

Nineteen years later in *Richardson v. Marsh*, 481 U.S. 200, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987), the practice of omitting any references to a defendant from a statement being introduced against a confessing codefendant was challenged a practice initially suggested by the Court itself. *See*, Part II., *supra*. Clariss Marsh, Benjamin Williams and Kareem Martin were charged with assaulting Cynthia Knighton and murdering her son, Koran, and her aunt, Ollie Scott. Over Marsh's objection, Marsh and Williams were tried together.[10] At trial, the state introduced a confession made by Williams shortly after his arrest. The confession had been redacted to omit all references to Marsh. In fact, on its face, the confession implicated no one other than Williams and Martin in the crimes. Williams did not testify. Nevertheless, Marsh was linked to the confession via her own testimony that she was in the vehicle on the way to the crime scene when, by Williams' admission he and Martin discussed their plans to rob and kill the victims, although Marsh claims not to have heard the conversation. Marsh also testified to being in the house during the robbery, but could not explain why she did not attempt to flee or otherwise assist the victims.

During his closing remarks, the prosecutor cautioned the jury not to use Williams' confession as evidence against Marsh. Nevertheless, he linked Marsh to the confession

[10] Kareem Martin was a fugitive at the time of trial.

by suggesting that if Marsh was in the car during Martin and Williams' conversation, she was, by implication, part of the criminal enterprise. Marsh was convicted of two counts of felony murder and one count of assault with intent to commit murder.

Marsh successfully appealed her conviction to the United States Court of Appeals for the Sixth Circuit. 781 F.2d 1201 (1986). In reversing her conviction, that court opined:

> "Sanctioning the admission of an extrajudicial statement in circumstances in which a substantial risk exists that the statement will be used against the defendant not only denies the Sixth Amendment Right to Confrontation, but raises serious due process concerns regarding the validity of the conviction and the fundamental fairness of the trial process. It is no answer to this unfairness to say that the evidence that set the stage was subject to cross-examination . . . [T]he determination of whether there exists a substantial risk that the jury might have [improperly] considered [the confession] 'may require consideration of other evidence.' "

781 F.2d at 1212 (citations omitted). Assuming the existence of such a risk, the Sixth Circuit noted that the only direct evidence [11] suggesting Marsh knew beforehand that the victims would be robbed and executed was Williams' account of his conversation with Martin just prior to the crime. *Id.* at 1210. In view of the lack of other evidence connecting Marsh to the activities of Williams and Martin, the prosecutor's linkage of Marsh to the confession proved "powerfully incriminating" to her with respect to the critical element of intent, *id.* at 1213, thereby violating her

[11] We note that under Maryland law, there is no difference, in terms of evidentiary value, between direct evidence and circumstantial evidence. *See, e.g., Magnum v. State*, 342 Md. 392, 398, 676 A.2d 80, 82 (1995).

Sixth Amendment confrontation right. Noting that other courts of appeals have declined to adopt the "evidentiary linkage" or "contextual implication" approach to the *Bruton* problem, the United States Supreme Court granted certiorari to resolve the conflict. 476 U.S. 1168, 106 S. Ct. 2887, 90 L. Ed. 2d 976 (1986).

The Supreme Court in *Marsh* rejected the Sixth Circuit's analysis and characterized the holding in *Bruton* as "a narrow exception" to the general principle that jurors follow instructions given them.[12] *Marsh*, 481 U.S. at 206-07, 107 S. Ct. at 1707, 95 L. Ed. 2d at 185. The Court premised its holding upon three basic assumptions. First, "where the necessity of . . . linkage [to other evidence] is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evi-

[12] In support of this principle, the Court cited *Francis v. Franklin*, 471 U.S. 307, 324-25 n.9, 105 S.Ct. 1965, 1976 n.9, 85 L. Ed. 2d 344, 359-60 n.9 (1985) (Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them), *Harris v. New York*, 401 U.S. 222, 225-26, 91 S. Ct. 643, 645-46, 28 L. Ed. 2d 1,4-5 (1971) (provided jury is properly instructed, statements obtained in violation of *Miranda* can be used to impeach defendant's credibility, even though inadmissible to prove defendant's guilt), *Marshall v. Longberger*, 459 U.S. 422, 438-39 n.6, 103 S. Ct. 843, 853 n.6, 74 L. Ed. 2d 646, 661-62 n.6 (1983) (crucial assumption underlying the system of trial by jury is that jurors will follow the instructions given them by the trial judge). *Tennessee v. Street*, 471 U.S. 409, 415, 105 S. Ct. 2078, 2082, 85 L. Ed. 2d 425, 431 (1985) (codefendant's confession properly admitted to prove defendant's confession was not coerced), *Watkins v. Sowders*, 449 U.S. 341, 347, 101 S. Ct. 654, 658, 66 L. Ed. 2d 549, 555 (1981) (instruction admonishing jury not to consider improperly admitted eyewitness testimony sufficient to cure error). *Walder v. United States*, 347 U.S. 62, 65-66, 74 S. Ct. 354, 356, 98 L. Ed. 503, 507 (1954) (illegally obtained evidence properly admitted to impeach defendant with appropriate limiting instruction). *Richardson v. Marsh*, 481 U.S. 200, 206-07, 107 S. Ct. 1702, 1707, 95 L. Ed. 2d 176, 185 (1987).

dence." 481 U.S. at 208, 107 S. Ct. at 1708, 95 L. Ed. 2d at 186. Unlike specific testimony directly inculpating the defendant, as was the case in *Bruton*, inferential incrimination can be avoided by discussing the jury from making the inference in the first instance. *Id.*, 107 S. Ct. at 1708, 95 L. Ed. 2d at 186.

Second, the practical effect of the "linkage" or "contextual approach" to the *Bruton* question would place an impossible burden upon trial courts. If limited to *facially* incriminating confessions, *Bruton* compliance could be had by simple redaction. *Id.* at 208-09, 107 S. Ct. at 1708, 95 L. Ed. 2d at 186 (citing *Bruton*, 391 U.S. at 134 n.10, 88 S. Ct. at 1627 n.10, 20 L. Ed. 2d at 484 n.10). Conversely, an anlysis requiring linkage requires both a pretrial and post-trial determination of whether, after viewing all the evidence introduced, the confession is so "powerfully incriminating" that it should either be excluded in the first instance or the defendant granted a new trial. *Id.* at 209, 107 S. Ct. at 1708, 95 L. Ed. 2d at 187. Such a result not only invites defense malfeasance, but consumes large quantities of time and guarantees nothing in the way of certainty. *Id.*, 107 S. Ct. at 1708, 95 L. Ed. 2d at 187.

Finally, although it might be suggested that the simple remedy to the *Bruton* problem is to forego joint trials when the confession of one defendant might conceivably incriminate the other, the efficacy of that remedy is questionable. *Id.*, 107 S. Ct. at 1708, 95 L. Ed. 2d at 187. Not only do joint trials serve an important function in our criminal justice system in terms of efficiency, they protect defendants from the unfair advantage that a later-tried defendant has over his earlier-tried counterpart, and avoid the criticism associated with inconsistent verdicts. *Id.*, 107 S. Ct. at 1708-09, 95 L. Ed. 2d at 187.

[13] The Court also acknowledged that *Bruton* could be complied with by not using codefendant confessions at all, but rejected that suggestion, noting that "confessions are . . . essential to society's

In the end, the Court declined to extend *Bruton's* reach, concluding that "the calculus changes when confessions that do not name the defendant are at issue." *Id.* at 211, 107 S. Ct. at 1709, 95 L. Ed. 2d at 188. Having said that, however, the Court specifically reserved the issue of "the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." *Id.* at 211 n.5, 107 S. Ct. at 1709 n.5, 95 L.2d Ed. at 188 n.5. This, of course, is the issue presently before us.

IV.

There exits a substantial split of authority on the proper approach to the question expressly left open in *Marsh*. Some courts subscribe to the "contextual" or "evidentiary linkage" approach to the *Bruton* problem. Those jurisdictions principally rely upon the notion that when a nontestifying codefendant's confession tends to inculpate a defendant in light of other evidence presented, or to be presented, at trial, thereby creating a "substantial risk" that the jury will improperly use the confession, the defendant's Sixth Amendment confrontation right is denied. *See, e.g., United States v. Van Hemelryck*, 945 F.2d 1493, 1502-03 (11th Cir. 1991); *United States v. Pendegraph*, 791 F.2d 1462, 1465-66 (11th Cir. 1986); *People v. Fletcher*, 13 Cal. 4th 451, 456, 917 P.2d 187, 189 (1996); *Smith v. United States*, 561 A.2d 468, 474 (D.C. 1989); *People v. Cruz*, 121 Ill.2d 321, 330-31, 521 N.E.2d 18, 22-23 (1988); *People v. Kahn*, 200 A.D. 129, 136-37, 613 N.Y.S.2d 198, 203-04 (1994); *State v. Johnson*, 71 N.C. App. 90, 92, 321 S.E.2d 510, 513 (1984).

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compelling interest in finding, convicting, and punishing those who violate the law.'" *Richardson v. Marsh*, 481 U.S. 200, 210, 107 S. Ct. 1702, 1708, 95 L. Ed. 2d 176, 187-88 (1987) (quoting *Moran v. Burbine*, 475 U.S. 412, 426, 106 S. Ct. 1135, 1143, 89 L. Ed. 2d 410, 424 (1986)).

Other jurisdictions, however, employ the "facial implication" doctrine, holding that when the complaining defendant's name is replaced with a neutral pronoun, and the confession does not otherwise, by itself, inculpate that defendant, it is admissible against the confessing codefendant. *See, e.g., United States v. Hoac*, 990 F.2d 1099, 1105 (9th Cir. 1993); *United States v. Williams*, 936 F.2d 698, 700 (2d Cir. 1991); *United States v. Strickland*, 935 F.2d 822, 825-26 (7th Cir. 1991); *United States v. Donohue*, 948 F.2d 438, 444 (8th Cir. 1991); *United States v. Vogt*, 910 F.2d 1184, 1192; (4th Cir. 1990); *United States v. Espinoza-Seanez*, 862 F.2d 526, 535 (5th Cir. 1988); *United States v. Gonzales*, 749 F.2d 1329, 1334 (9th Cir. 1984); *United States v. Belle*, 593 F.2d 487, 493 (3d Cir. 1979); *Hodges v. Rose*, 570 F.2d 643, 646-47 (6th Cir. 1978); *United States v. Dady*, 536 F.2d 675, 677-78 (6th Cir. 1976); *Harris v. State*, 218 Ga. App. 472, 473, 462 S.E.2d 425, 427 (1995); *State v. Craney*, 662 A.2d 899, 903 (Me. 1995); *Commonwealth v. Sanford*, 323 Pa. Super 436, 439-40, 470 A.2d 998, 999-1000 (1984).

At their extremes, neither approach is completely satisfactory. Evidentiary linkage, applied in its most liberal form, completely undermines the long held, and vitally necessary, presumption that juries follow trial court instructions. The approach also has practical administrative difficulties and may harm defendants as much as it may protect them.

Similarly, while the facial implication doctrine has simplistic appeal, redacted confessions with "neutral pronouns may still prove impossible to 'thrust out of mind.'" *People v. Fletcher*, 13 Cal. 4th at 463, 917 P.2d at 195 (quoting *Marsh*, 481 U.S. at 208, 107 S. Ct. at 1707-08, 95 L. Ed. 2d at 186). The possibility certainly exists whereby notwithstanding the substitution of a defendant's name with a neutral pronoun, a jury could reach but one conclusion that the omission is, in fact, the nonconfessing

codefendant.[14] Although one might argue that is so only when linked with other evidence admitted at trial, the inferential step that the jury must take to reach that conclusion may be so small as to be no step at all. In those instances, the act of redaction becomes a mere formalistic exercise devoid of the Constitutional protections undergirding *Bruton*, and the confession's exclusion from evidence is warranted.[15] *See Clark v. Maggio*, 737 F.2d 471, 476 (5th Cir. 1984) (redaction technique must be employed cautiously and carefully to avoid violating the spirit, if not the letter, of *Bruton*).

Despite the State's assertions to the contrary, it does not necesarily follow from *Bruton* or *Marsh* that a confession that does not implicate a nonconfessing codefendant by name, automatically, and without further inquiry, passes Constitutional muster. We reject, in its most pristine form, the facial implication doctrine urged by the State.

We think the better approach is that typified by the holding in *United States v. Pendegraph, supra*, where the United States Court of Appeals for the District of Columbia Circuit held that "a redacted confession may still

[14] *See, e.g., Harrington v. California*, 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969) wherein four defendants, one Caucasian and three African-Americans, where tried together. Harrington, the Caucasian, had made statements placing himself at the scene of the crime. The confession of a nontestifying codefendant was introduced against that codefendant. Although the confession did not implicate Harrington by name, it did refer to "the white guy." Under the circumstances, the Court concluded the inculpatory effect was the same as if it had. *See also United States v. Foree*, 43 F.3d 1572, 1578 n.9 (11th Cir. 1995) (jury compelled by other evidence to conclude that defendant was person named in nontestifying codefendant's confession): *People v. Terry*, 2 Cal. 3d 362, 387-88, 466 P.2d 961, 976-77 (1970).

[15] The other option is to grant a severance and try the nonconfessing defendant separately if the state otherwise chooses to introduce the facially incrimnating confession against the confessing defendant.

violate the *Bruton* rule if the statement *compels* a directly inculpating inference" between the redacted confession and the nonconfessing codefendant. 791 F.2d at 1465 (emphasis added) (where the word "individual" was substituted for Pendegraph's name in his codefendant's confession, the jury could infer that Pendegraph was that "individual" if only because there was no other possibility); *see also United States v. Washington*, 952 F.2d 1402, 1407 (D.C. Cir. 1991) (with proper limiting instruction, Confrontation Clause not violated by redacted statement that, when viewed with other evidence, does not create an inevitable association with the nonconfessing defendant).

As we see it, this approach accords with the rationale of *Bruton* as explained and limited by *Marsh*. The substantial risk to which *Bruton* speaks comes not from the incriminatory tendency of a nontestifying codefendant's confession as to another defendant, but from the belief that in certain exceptional circumstances, a jury will not be able to resist the temptation to ignore the trial court's instructions to overlook what has been thrust into their line of sight. Indeed, jurors are strongly presumed to follow trial court instructions. *See* n.6, *supra*. When however, the directly (and undeniably) inculpatory statements of a codefendant are given to the jury's consideration, notwithstanding a limiting instruction to the contrary, the presumption is overcome and a substantial risk therefore exists that the jury will use the confession as evidence against the nonconfessing defendant. *Bruton*, 391 U.S. at 136-37, 107 S. Ct. at 1628, 20 L.Ed.2d at 485. In other words, a *Bruton* violation occurs when jurors are compelled to do, as rational human beings, that which they have been instructed by the trial court they must not link a nonconfessing defendant to a nontestifying codefendant's confession. The compulsion to make the impermissible inference must be compelling, inevitable, and subject to little or no debate. Otherwise, the general and strong presumption that jurors follow

their instructions is not overcome, and the requirements of *Bruton* are therefore satisfied. *See Marsh*, 481 U.S. at 211, 107 S. Ct. at 1709, 176 L. Ed. 2d at 188.

To be sure, some courts have predicated their conclusions that a confession creates a "substantial risk" that the jury will not heed trial court instructions and therefore is "powerfully incriminating" to a defendant based upon the relative strength of the state's case. *See, e.g., United States v. Key*, 725 F.2d 1123, 1126 (7th Cir. 1984); *English v. United States*, 620 F.2d 150, 152 (7th Cir. 1980). That analysis, however, concerns whether the denial of a defendant's confrontation rights was harmless, *see, e.g., Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 705 (1967), not whether the denial of those rights occurred in the first place. We agree that

> "[t]he decision on how to '*Brutonize*' a statement, if necessary, must ordinarily be made early in the trial, when the judge is not in an ideal position to assess the strength of the government's case. A judge can decide at the outset, however, whether a codefendant statement is likely to incriminate other defendants in such a way as to create a substantial *risk* that the jury will consider it in deciding on the guilt of those defendants. If the incriminating references ultimately adds little to the government's case, then their exclusion does no harm, and the confrontation rights of the defendants are preserved. We do not read *Bruton* as guaranteeing a right of confrontation only as against testimony that proves to be vital to the prosecution's case.

Hodges v. Rose, supra, 570 F.2d at 647 n.9. It was in this manner that the trial judge in the case *sub judice* ordered the redaction of Bell's confession, but otherwise allowed the State the benefit of its evidentiary value.

V.

As indicated in Part I., *supra*, the State substituted the words "deletion" or "deleted", for the names of Gray and Vanlandingham. Bell's redacted confession, read to the jury and introduced into evidence, provided in pertinent part:

> "Question, what can you tell me about the beating of Stacey Williams that occurred on 10, November, 1993?
>
> Answer, an argument broke out between *deletion* and Stacey in the 500 block of Louden Avenue. Stacey got smacked and then ran into Wildwood Parkway. Me, *deleted*, and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up, we walked him back to Louden Avenue. I then walked over and used the phone, Stacey and the others walked down Louden.
>
> Question, when Stacey was beaten on Wildwood Parkway, how was he beaten?
>
> Answer, hit, kicked.
>
> Question, who hit and kicked Stacey?
>
> Answer, I hit Stacey. He was kicked, but I don't know who kicked him.
>
> Question, who was in the group that beat Stacey?
>
> Answer, me, *deleted*, *deleted*, and a few other guys. Question, did anyone pick Stacey up and drop him to the ground?
>
> Answer, no, when I was there.
>
> Question, what was the argument over between Stacey and *deleted*?
>
> Answer, some money that Stacey owed *deleted*.

> Question, how many guys were hitting on Stacey?
>
> Answer, about six guys.
>
> Question, do you have a black jacket with Park Heights written on the back?
>
> Answer, yes.
>
> Question, who else has these jackets?
>
> Answer, *deletion*."

Prior to the confession's introduction into evidence, the court cautioned the jury that

> "the statement provided by Mr. Bell is to be considered by you as evidence against Mr. Bell only and in no way is Mr. Bell's statement provided to the detective about which he's about to testify to be considered as evidence against Mr. Gray. It is evidence against Mr. Bell only, and, as I will instruct you later, you will consider the evidence against the defendants individually and reach a separate verdict as to each defendant."

Taking its cue from the District of Columbia Court of Appeals, the intermediate appellate court relied heavily upon *Smith v. United States*, 561 A.2d 468 (D.C. 1989) wherein blank spaces were used in place of Smith's name in his co-defendant's inculpatory, but otherwise redacted, confession. The Court of Appeals for the District of Columbia opined that:

> "In order to determine whether a substantial risk exists [that the jury will improperly use the confession against the non-confessing codefendant], 'the trial court must consider the degree of inference the jury must make to connect the defendant to the statement and the degree of risk that the jury will make that linkage despite a limiting instruction.' The trial court's assessment as to whether the redaction effectively avoids linkage with the defendant must be make in the context of other evidence admitted at trial."

Smith, 561 A.2d at 474 (quoting *Foster v. United States*, 548 A.2d 1370, 1379 (D.C. 1988). Applying that standard, the Court of Special Appeals noted that "mere deletion of [Gray and Vanlandingham's names]" failed to eliminate from Bell's confessijon *Bruton* hazards because the jury "did not have to make a substantial inference that [Gray] was [one of] the person[s] neutrally referenced in the redacted statement." *Gray*, 107 Md. App. at 327, 667 A.2d at 990. In other words, in light of other evidence presented at Gray's trial, "the jury could reasonably infer that it was appellant whose name had been 'deleted.'" 107 Md. App. at 328, 667 A.2d at 991.

While we agree that the jury *could have* reasonably inferred that one of the deleted names belong to Gray, that inference was not compelled. As both the trial court and the intermediate appellate court acknowledged, as many as six individuals participated in the attack on Williams. The Court of Special Appeals, however, pointed out that "only three were positively identified Bell, appellant, and [Vanlandingham]" and concluded that "[Gray]'s role was clearly demonstrated by Bell's confession, rendering it facially incriminating[.]" 107 Md. App. at 327, 667 A.2d at 990. We disagree.

As we have said, a *Bruton* violation occurs when a co-defendant's confession, either facially, or by compelling and inevitable inference, inculpates a nonconfessing defendant. Under those circumstances, there *is* a substantial risk that the jury will not heed the trial court's instructions to disregard the confession as evidence against the non-confessing defendant or defendants.

True, Shay Yarberough implicated the same individuals from the witness stand as did Bell's confession, but Yarberough also testified that at least three other individuals

were involved in the fray, whom he could not (or would not) identify. Other than by inference, the jury had no way of knowing that Yarberough's testimony and Bell's confession paralleled, and the prosecution did not, in any way, suggest such a coincidence.[16] It was that very inference that the trial court instructed the jury that they must not make.

As we indicated, *supra*, that the jury could have reasonably connected Gray to Bell's confession is not sufficient to raise a *Bruton* challenge. Although the jury knew at the time of trial Vanlandingham was dead, the omitted references in Bell's confession could have been any one of at least four other individuals a fact emphasized by the States' Attorney no less than three times during her final summation. The jury was instructed not to use Bell's confession as evidence against Gray, and, in light of the strong presumption that the jury followed those instructions, Gray's Sixth Amendment confrontation right was adequately protected. His unsupported speculation about what the jury might have done if they drew an impermissible inference is simply insufficient to warrant a reversal upon these facts. In short, "there does not exist [in the present case] the overwhelming probability of [the jury's inability to follow trial court instructions] that is the foundation of the *Bruton*[] . . . Rule." *Marsh*, 481 U.S. at 208, 107 S. Ct. at 1707, 95 L. Ed. at 185.

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[16] Although there is no evidence or allegation of misconduct in this case, the *Marsh* Court alluded to the possibility that prosecutorial attempts to undermine a trial court's limiting instruction by encouraging jurors to make impermissible inferences regarding the relationship between a defendant and a nontestifying codefendant's confession may form the basis of a *Bruton* challenge. 481 U.S. at 211, 107 S. Ct. at 1709, 95 L. Ed. 2d at 188. At least two courts have provided relief upon this basis. *See United States v. Sherlock*, 865 F.2d 1069 (9th Cir. 1989); *People v. Cruz*, 521 N.E.2d 18, cert. denied, 488 U.S. 869, 109 S. Ct. 177, 107 L. Ed. 2d 146 (1988).

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED; CASE REMANDED TO THAT COURT WITH DIRECTIONS TO AFFIRM THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY. COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY RESPONDENT.

Bell, C.J., and Eldridge, J., dissenting:

We would affirm the judgment of the Court of Special Appeals for the reasons set forth in Judge Cathell's excellent opinion for that court. *See Gray v. State*, 107 Md. App. 311, 667 A.2d 983 (1995).

SUPREME COURT OF THE UNITED STATES

No. 96-8653

KEVIN D. GRAY,
Petitioner

v.

MARYLAND

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 16, 1997